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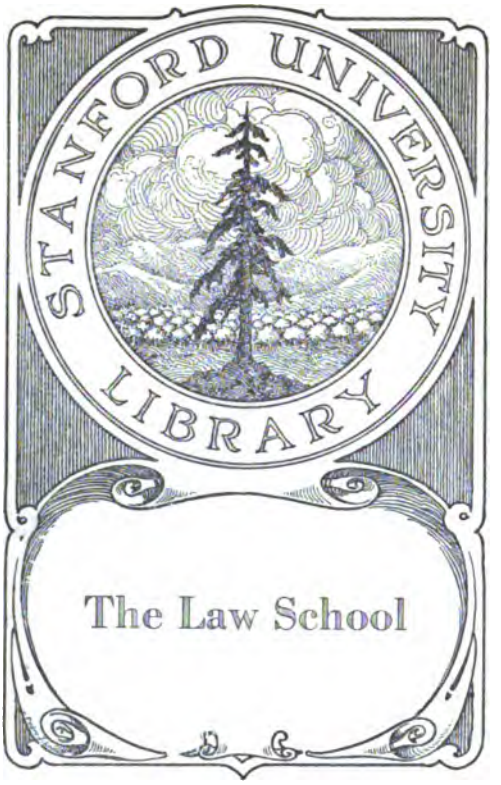
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# National Bankruptcy Register

# REPORTS.

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# SYNOPSIS OF CASES, No. 1.

315085

*In re* James M. Seeley.

The rule that every person is presumed to intend the natural and probable consequences of his acts is only a rule of evidence, and where the testimony is conflicting it is for the jury to find the actual intent existing in the mind of the party.

Though the necessary consequence of a payment by an insolvent debtor may be to give a preference, he will not be conclusively presumed to have intended such preference where the evidence shows he was actuated by a different motive.

But where the party is insolvent, and the payment necessarily operates as a preference, and no explanation is offered, the presumption is conclusive, and there is no question for the jury.

The words "fraudulent preference" as used in the Bankrupt Law do not import moral fraud. Nothing more is meant than that a payment shall have been made under circumstances which the law inhibits as a preference.

The acts enumerated in R. S., Sec. 5110, are not in the nature of offences or forfeitures of a right to a discharge, but are rather in the nature of violations of conditions precedent.

*Quære:* Whether it is competent to show that a general assignment for the benefit of creditors was not executed for the purpose of defeating the operation of the Bankrupt Law? 1

Duffield, Assignee, *v.* Horton *et al.*

An attachment issued within four months preceding the commencement of proceedings in bankruptcy is absolutely dissolved by such proceedings.

An attachment was issued in an action against one Y., within four months preceding the commencement of proceedings in bankruptcy against him and was served on defendants as debtors of Y. Pending the bankruptcy proceedings a general judgment was recovered in said action, and an execution issued thereon, and the defendants paid to the sheriff the amount of their indebtedness. *Held*, That such payment was voluntary, and did not discharge their obligation to the bankrupt or his assignee. 13

Hall, Assignee, *v.* Waterbury.

An assignee in bankruptcy cannot be required to give security for costs in an action pending in a State Court, although he is a non-resident of the State.

Neither is he personally liable for costs, only where he is guilty of misconduct or bad faith. 15

*In re* Ebenezer and James W. Cheney.

A register has power to adjourn a meeting of creditors when, in his judgment, the interest of the whole body of creditors or of sound policy requires it.

Creditors, when duly convened, have power to choose assignees—to declare dividends—to consider and act upon propositions for a composition. But it is for the register primarily, or for the District Judge, on the register's certificate, to determine when and what meetings shall be held. The register's discretion in such action will not ordinarily be interfered with. A register who, against the remonstrance of the bankrupt's counsel, adjourned a composition meeting in order that creditors might be afforded the option of electing an assignee, was held to have exercised a proper discretion. 16

# THE NATIONAL BANKRUPTCY REGISTER REPORTS.

## VOLUME XIX.

### UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

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### *In re JAMES M. SEELEY.*

On motion for a new trial.

Seeley petitioned for a discharge, and the case was tried before a jury upon the following specifications in opposition thereto:

1. A general assignment for the benefit of his creditors to

Francis G. Russell, alleged to have been made in contemplation of bankruptcy and for the purpose of preventing the property so assigned from coming into the hands of the assignee in bankruptcy, and being distributed in satisfaction of his debts. This assignment was executed on Monday, the 11th day of December, 1877, at the Russell House in this city, whither Seeley had gone, partly at least, to avoid the importunity of one of his creditors. It seems that Seeley had contracted to sell his stock to one Auringer for five thousand dollars, for the purpose of paying his debts, but the bargain had fallen through, and by the advice of counsel he finally concluded to execute the assignment.

2. In making a fraudulent preference to one Scott, two days before his general assignment, and when insolvent. The facts were, that Seeley was indebted to Scott in about the sum of twelve hundred dollars, for money loaned; that on the Saturday before the assignment was executed he permitted Scott to take goods from his store to the amount of eight hundred dollars. This and the transfer to Harris, hereafter mentioned, were the only important transactions for several days before the assignment. Scott had formerly occupied a produce store upon Woodward Ave., near Mr. Seeley's place of business, and had become intimate with him there. For the past twelve or fourteen years, however, he had been a farmer, and it seems had been accustomed to loan Seeley money from time to time, for which a note had been taken, payable on demand. Both Scott and Seeley swear that Scott did not surrender his note, and that there was no agreement that the goods were to be received in payment. On the other hand there was no mention of the amount of goods Scott was to take, and no particular credit agreed upon. Scott swears that he had intended to open a store himself for the sale of essential oils, had rented a building for that purpose, and had engaged one or two of Mr. Seeley's clerks, but, owing to some failure to raise the money, this plan was never carried out, and the goods were stored in another building, and subsequently bought back by the assignee in bankruptcy at seventy-five cents on the dollar.

3. In making a fraudulent preference to one Harris also, upon the Saturday before the assignment, and when insolvent. There was no conflict here as to the facts. Seeley was indebted to Harris in about the sum of one hundred and twelve dollars, and upon the same day of the transfer to Scott he turned out to him goods to the amount of his debt, in consideration of his surrendering a note for one hundred dollars. On Seeley's journal there is an entry, under date of December 9, 1876, of "bills payable to A. R. Harris, for he surrenders note July 7, 1876, interest at ten per cent., one hundred dollars, half interest on the above note six months, five dollars." This was the entire testimony as to the transaction.

The case was submitted to the jury under instructions that if they found the assignment was made in contemplation of becoming bankrupt, for the purpose of preventing the property from coming into the hands of the assignee or of being distributed in satisfaction of his debts, or if payments were made to Scott or Harris when insolvent, with an intent to prefer them, they should return a verdict of guilty.

Exceptions were taken to the refusal of the court to instruct the jury that as matter of law they should return such verdict.

*E. E. Kane*, for the motion.

*Don M. Dickinson*, for the bankrupt.

Brown, J.—With some hesitation, I submitted the question to the jury whether the assignment and payments in this case were made with the prohibited intent. I am free to say their verdict did not command my approval.

Counsel for the creditors claims that every person is conclusively presumed to intend the natural and probable consequences of his own act, and as it was the necessary effect of the assignment to withdraw the property from the hands of the assignee in bankruptcy, and of the payments to Scott and Harris to prefer them over the other creditors, the court was bound to find the intent as matter of law and to take the case away from the jury. The position of the bankrupt was, that this rule, that a man is held to contemplate the necessary con-

sequences of his acts, is a mere rule of evidence, and that it is for the jury to find the actual intent existing in the mind of the party.

My own view is that, as a general rule, the presumption is one of fact, and that where there are circumstances in the case tending to show that the party did not, in paying a certain creditor, in fact intend to prefer him, the question as to the actual intent may be left to the jury, notwithstanding the party was insolvent, and the necessary effect of his payment was to prefer. There have several cases arisen under the Bankrupt Law where all the elements of a preference existed, viz.: insolvency and payment to a creditor which operated as a preference: in other words, the necessary consequence of the act was to prefer, and yet the court has not hesitated to find that no preference was intended. Such are the cases where payment has been made under a *bona fide* misapprehension of the debtor's real condition, though he was in fact insolvent; and where payment was made to grocers, butchers, and other persons furnishing necessaries to a debtor's family, or by a tenant to a landlord, in order to preserve his home, or prevent the forfeiture of a lease. In such cases the debtor is only presumed to know his condition until the contrary appears, the burden of proof being upon him. (*In re* Silverman, 4 N. B. R., 523; *In re* Oregon Printing & Publishing Co., 13 Id., 503–514; *Miller* v. *Keys*, 3 Id., 224; *In re* Bachelder, 3 N. B. R., 150, 1 Lowell, 373.) In *Re* Locke (2 N. B. R., 382, 1 Lowell, 293), the court observes: "I am not prepared to say that the mere payment of a debt by a debtor who is insolvent, and knows it, is always necessarily an act of bankruptcy." Upon this point I give no opinion. Such a rule is open to the same objection with the one just considered, viz.: that it substitutes an inflexible rule of law for an inference which is properly one of fact. That every person must be presumed to contemplate the necessary consequences of his act is true, but when we come to consequences that are only more or less probable, it is fit that the jury should say whether they were in the mind of the party or not. No doubt in the absence of controlling evidence

they may decide by the act itself; but the intent to prefer must include, I think, the intent or at least the fear of stopping payment, which idea is not necessarily included in insolvency." (*In re* Croft Bros., 17 N. B. R., 324.)

In the case of *In re* Rosenfield (2 N. B. R., 116) Judge Field, of New Jersey, held that servants' wages, payments made to counsel for services rendered and to be rendered, payments to an insurance company for premiums upon the bankrupt's house and furniture, to save the forfeiture of a lease, and all expenditures made by him in the ordinary course of business for the support of his family, could not be considered fraudulent preferences, notwithstanding all the legal elements of a preference were present, except the intent actually existing in the mind of the bankrupt.

So in *Re* Sidle (2 N. B. R., 220) the payment of attorney's fees by an insolvent was held no preference under the statute, on the ground of public policy which makes faith in the matter of attorney fees obligatory upon the parties. In *Re* Brent (8 N. B. R., 444) Judge Dillon held that payments in the ordinary course of business, with a *bona fide* expectation that the debtor can keep along without going into bankruptcy, there being no actual design to favor or prefer, will not bar a discharge. In *Re* Randall and Sunderland (3 N. B. R., 18) Judge Deady remarks that one of the necessary consequences of a general assignment for the benefit of creditors is to prevent the property from coming to the assignee in bankruptcy and being distributed under the Bankrupt Act, and that the assignors must be presumed to have intended this, *unless they show to the contrary.* As to this, the burden of proof is upon them. (See also *Webb* v. *Sachs*, 15 N. B. R., 168, 4 Sawy., 158; *In re* Pierce & Holbrook, 3 N. B. R., 258.)

I have no doubt the law is correctly stated in a recent case of *Rice* v. *Grafton Mills* (13 N. B. R., 209, 117 Mass., 228). The evidence tended to show that one Smith, of whom the plaintiffs were assignees, was the keeper of a grocery and variety store, which was largely patronized by the employes of the defendant; that Smith was accustomed to deliver goods to

these employes, rendering accounts monthly to the defendant, which paid to Smith whatever balance was due from the mills to their laborers. Smith was also indebted to the defendant in the sum of one thousand nine hundred dollars for money loaned. The amount of goods delivered in the two months preceding Smith's bankruptcy was about one thousand five hundred and eighty dollars, and the defendant, instead of paying the money to Smith, knowing his approaching bankruptcy, applied this amount to the balance due from Smith for money loaned, thus reducing it to about four hundred and thirty-seven dollars; the assignee claimed this to be a preference, and insisted the money should have been paid to Smith as had been done before, instead of applying it upon his account for money loaned. The court observes: "The intent to prefer is essential and is to be found by the jury. A preference was not the direct or necessary consequence of the acts of Smith. A man may, indeed, be presumed to intend the natural and probable consequences of his own acts, but that presumption is only one element of proof to establish the fact of actual intent. The evidence does not show that, prior to the attachment by which Smith's business was interrupted, the probability that the defendant would insist upon a set-off, and thus secure a preference, was so obvious as conclusively to maintain the proposition that he contemplated it, and sold and delivered the goods with the view to such a preference, especially against the fact assumed by the instructions that he 'expected and supposed' otherwise." What the court would have held if the preference had been the direct and necessary consequence of the acts of Smith, and no doubt had been cast upon his intention by the circumstances connected with the payment, does not appear.

We may consider the law then settled that, although the act must necessarily produce a certain result, the party is not conclusively presumed to have intended such result, where other circumstances tend to show that he may have contemplated a different one. But, where the act is wholly unexplained, and the effect is not only natural and probable but necessary, and no attempt is made to show that the party contemplated a dif-

ferent result, I understand the presumption to be conclusive, and the court is bound to instruct the jury as matter of law. So, where the evidence is so overwhelming that the court, in an ordinary case, would be justified in taking the question away from the jury, I do not understand that the fact that such evidence bears upon the intent of a party in doing a certain act, relieves the case from the operation of the general rule in the conduct of trials laid down by the Supreme Court in *Pleasants* v. *Fant* (22 Wall., 116), *Commissioners* v. *Clark* (94 U. S., 278, 284), *Seitz* v. *U. S.* (11 C. L. N., 97). In other words, I do not suppose there is any such sanctity about the question of fraud as requires it to be submitted to a jury when the testimony all points in one direction. "Before the evidence is left to the jury, there is, or may be, in every case, a preliminary question for the judge, not whether there is literally no evidence, but whether there is any on which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." (*Commissioners* v. *Clark*, 94 U. S., 284.)

There seems to be a general impression, even among lawyers, that all fraud in the eye of the law necessarily involves some sort of moral turpitude. This is certainly not the case. The law frequently adjudges that to be fraud which produces a certain result, notwithstanding the entire innocence of the party, not only of a covinous design, but of an intention to bring about that result. (Bump on Fraudulent Conveyances, 71; *Potter* v. *McDowell*, 31 Mo., 62; *Grover* v. *Wakeman*, 11 Wend., 187.) And when the words "fraudulent preference" are used in Section 5110, nothing more is meant than that a payment shall have been made under circumstances which the law inhibits as a preference. (*In re* Rosenfield, 1 N. B. R., 575, 580.) There is no element of moral fraud involved in such case, for at common law a man may lawfully pay any creditor in preference to another.

Again, counsel for the bankrupt argued that the jury ought to pass upon the question of intent in every case, as the acts mentioned in Section 5110 are in the nature of offences or for-

feitures of a right the bankrupt has to his discharge, and the proceeding is therefore *quasi criminal.* Support for this position is found in an incidental remark of Judge Field in the case of *In re* Rosenfield (1 N. B. R., 575). It is clear, however, that a man has no moral or legal right to be released of his debts, except by virtue of some statute, and that, in the enactment of such statute, Congress has the power to impose such conditions as it pleases to the granting of a discharge. It has, indeed, refused it altogether in voluntary cases, except by consent of a certain proportion of creditors. I am better pleased with those opinions which treat the discharge as a *favor*, and the commission of one of the acts specified, as the violation of a *condition precedent.* Such was the position of Judge Hall in *Re* Cretiew (5 N. B. R., 423, 430), and of Judge Lowell in *Re* Goodfellow (3 N. B. R., 452, 1 Lowell, 510). I see no reason why, in administering the law regarding fraudulent conveyances under this section, we should apply any other or different rule than if the question arose under Section 5021.

Returning now to the main proposition that, where the necessary effect of an act is to produce a certain result, and no other intent is shown to have influenced the actor, he shall be presumed to have contemplated this result, we find it supported by a great weight of authority.

In the leading case of *Cunningham* v. *Freeborn* (11 Wend., 240) Mr. Justice Nelson held that even under a statute which provided that the question of fraudulent intent in all cases of assignment should be deemed a question of fact and not of law, fraud in law was not abolished, and that if the jury found contrary to the law or facts the court would be bound to set aside the verdict. The court states: "The true doctrine on this subject, notwithstanding the statute, I apprehend is, that if there is any provision in the deed of assignment, or any fact admitted in the answer, which is *per se* fraudulent according to the law of the case, it is so, the denial of the fraudulent intent to the contrary notwithstanding; that fraud in fact is a question compounded of law and of fact, which is to be found by the jury in a court of law, under proper direction duly observed by

them, and may be by the chancellor in a court of equity. . . . The admission of facts which are *per se* fraudulent in judgment of law are as much so and as conclusive upon the defendant as if he had in express terms admitted a fraudulent intent in his answer, and in such a case any subsequent disclaimer of such intent will not avail him . . . for the legal intent from these facts is stronger than the mere admission of it subsequently denied. . . . And if the weight of evidence is such, when applied to well-settled principles of law in relation to these voluntary assignments by failing debtors, as to force upon him the conclusion of a fraudulent intent, he is bound so to find, notwithstanding the denial of it in the answer, and if the jury do not thus find, a court of law would be bound to set aside the verdict." In an early case in this State (*Kirby* v. *Ingersoll* Harr. Ch., 102), it was held that an assignment containing illegal provisions was void upon its face, notwithstanding all intent to commit fraud was denied. This has ever since remained the settled law of this State. (*Buck* v. *Sherman*, 2 Doug.; *Pierson* v. *Manning*, 2 Mich., 445.) The State reports contain a large number of cases to the same general effect. (*Ewing* v. *Gray*, 12 Ind., 64; 9 Ind., 461; *Allen* v. *Wheeler*, 4 Gray, 123; *Potter* v. *McDowell*, 31 Mo., 62; *Milne* v. *Henry*, 40 Pa., 352; *Freeman* v. *Pope*, L. R., 9 Eq., 206.) The Supreme Court of the United States lent its sanction to the same doctrine in *Lukins* v. *Aird* (2 N. B. R., 81, 6 Wall., 78). In this case a debtor in failing circumstances conveyed his land for a valuable consideration by deed, without reservation, but reserved to himself verbally the right to occupy and possess it for a limited time for his own benefit. The court, in this case, found the fraud to be an inference of law, on which the court was as much bound to pronounce the conveyance void as to creditors, as if the fraudulent intent were directly proved. To the same effect is *Toof* v. *Martin* (6 N. B. R., 49, 13 Wall., 40, 48), in which the intent to prefer was held to be conclusively presumed from the fact of preference.

Under the Bankrupt Law, decisions to the same effect are numerous. In *Re* Smith (3 N. B. R., 377) Judge Hall, in

speaking of general assignments for the benefit of creditors, and the presumptions attaching thereto, uses the following language: "Every person of a sound mind is presumed to intend the necessary, natural or legal consequences of his deliberate Act. This legal presumption may be either conclusive or disputable, depending upon the nature of the act and the character of the intention, and when, by law, the consequences must necessarily follow the act done, the presumption is ordinarily conclusive and cannot be rebutted by any evidence of a want of such intention." In *Re* Drummond (1 N. B. R., 231) Judge McDonald held that where the necessary consequences of a transfer by the bankrupt of all his property to a portion of his creditors were not only that it would probably give them a preference, but would necessarily and certainly produce that effect, the bankrupt must be conclusively presumed to have intended it. In *Re* Black and Secor (1 N. B. R., 353, 361) Judge Blatchford held that the burden of proof was upon the debtor to show that he had not the intent to prefer. (See also *In re* Sutherland, 1 N. B. R., 531, 535; *In re* Bachelder, 3 N. B. R., 150, 1 Low., 373; *In re* Locke, 2 N. B. R., 382, 1 Low., 293, 295.)

In *Re* Brodhead (2 N. B. R., 278) Judge Benedict held that a general assignment for the benefit of creditors cast upon the bankrupt the burden of showing the absence of the prohibited intent.

In *Re* Goldschmidt (3 N. B. R., 165, 169) Judge Blatchford treats a general assignment for the benefit of creditors as necessarily involving the existence of a purpose to prevent the property from being distributed in pursuance of the Bankrupt Act, in satisfaction of the debts, and refused a discharge. In the case of *Re* Croft Brothers (17 N. B. R., 324) Judge Blodgett held that, although a general assignment was an act of bankruptcy, in order to prevent a discharge it must be made with an intent to prefer, or for the purpose of preventing the property from coming into the hands of the assignee in bankruptcy, or from being distributed in satisfaction of his debts. He does not undertake to say that such an assignment does not

necessarily presuppose that intent, but finds that in the case before him there were circumstances showing an actual intent in the mind of the bankrupt to withdraw certain property from the partnership fund, and therefore refused a discharge. In the case of *Hardy* v. *Bininger* (4 N. B. R., 262) Judge Woodruff held that the procuring of a bankrupt's property to be put into the hands of a receiver of a State Court necessarily operated to defeat the operation of the Bankrupt Law, and that in the judgment of the law the bankrupt knew when he did it that it would have that effect, and knowing the effect he must have intended to produce it when he voluntarily chose to do the act. "Whatever his motive was he acted voluntarily in choosing, and therefore in intending all the legal results which would flow from his action in the matter. This was a creditor's petition under Section 39. In the case of *In re* Globe Insurance Company (14 N. B. R., 311) Judge Emmons held a general assignment to be an Act of Bankruptcy, upon the ground it defeated the operation of the Bankrupt Law, its effect in barring a discharge was not considered, nor does the learned judge discuss the question whether evidence may be received to show that the bankrupt in fact executed the assignment with no intent to defeat the operation of the act. In the recent case of *In re* Kasson (18 N. B. R., 379) Judge Wallace held that a voluntary general assignment bears conclusive evidence upon its face of the intent of the assignor to prevent the property transferred being distributed under the Bankrupt Act. "By such an instrument the debtor not only selects his own assignee, but he selects one who has no power to question or attack a class of transactions which the Bankrupt Act seeks to prevent."

Let us apply these principles to the facts of this case. The necessary effect of the general assignment to Russell was to withdraw the property assigned from the operation of the Bankrupt Act, and to secure a distribution by an assignee of the bankrupt's own choosing. It is true that the assignment expressed an intention upon its face to secure an equal distribution of the assets of the party among his creditors, "and in

no manner or way to impede or delay the operation of the Bankrupt Act, but to give the same benefits which might be derived under the said Act, without the costs, expenses, and losses attendant upon the winding up of an estate in bankruptcy." There was also other evidence offered tending to show that the bankrupt did not in fact propose to have his estate wound up by his assignee, but that he executed the assignment as a preliminary step to his filing a voluntary petition, and in order to secure his property from attachment while such petition and the schedules were being prepared. Whether such evidence be competent to rebut the intention which the law infers from such an assignment is a doubtful question. Clearly, if such intention existed, the bankrupt would be powerless to carry it out without the assent of the assignee, because when once vested with the trust he becomes the absolute owner for the purposes specified in the assignment, and the assignor cannot revoke it. Several of the cases above cited, however, seem to indicate that such testimony is competent, and that the assignee might show an actual intent different from the one which the law infers from the assignment itself. I do not find it necessary to express an opinion upon the point.

With regard to the transfer of goods to Scott, I think the verdict of the jury was clearly against the weight of evidence, and for that reason, if for no other, it must be set aside. Almost every fact connected with this transaction tends to show that the goods were turned over in payment of Seeley's note, and that Scott had no idea of paying for them. A general denial by Seeley of an intent to prefer will avail nothing as against the undisputed facts connected with the transfer.

There was no dispute at all with reference to the transfer to Harris. The necessary effect of the transfer was to prefer him, and as there was no attempt to explain away the inference that he intended to prefer, the presumption of such an intent must be held conclusive as matter of law.

I think the objecting creditors were entitled to the instruction prayed for, and that the case ought not to have been left to the jury. The verdict must be set aside, and a new trial granted.

COURT OF APPEALS—NEW YORK.

APRIL 2, 1878.

An attachment issued within four months preceding the commencement of proceedings in bankruptcy is absolutely dissolved by such proceedings.

An attachment was issued in an action against one Y., within four months preceding the commencement of proceedings in bankruptcy against him and was served on defendants as debtors of Y. Pending the bankruptcy proceedings a general judgment was recovered in said action, and an execution issued thereon, and the defendants paid to the sheriff the amount of their indebtedness. *Held*, That such payment was voluntary, and did not discharge their obligation to the bankrupt or his assignee.

*J. DAVIS DUFFIELD, Assignee, &c., of CHARLES T. YERKES & Co., respondent,* v. *HARRY L. HORTON and DAVIS JOHNSON, appellants.*

THIS action was brought to recover of defendants money claimed to be due one Yerkes, a bankrupt. It appeared that on October 18, 1871, defendants owed Yerkes five hundred and sixty-six dollars and ninety-six cents. On that day one Bouvier caused an attachment to be issued and served on defendants. On November 10, 1871, a petition in bankruptcy was filed by a creditor of Yerkes, and on December 13, 1871, Yerkes was adjudged a bankrupt, and on January 23, 1872, plaintiff was appointed assignee of Yerkes, and notice of such appointment was duly published. On December 30, 1871, Bouvier recovered a judgment against Yerkes, and an execution was issued, and on January 23, 1872, the defendants voluntarily paid the sheriff the amount due thereon. The judgment and execution were both general. No notice of the bankruptcy proceedings was served on defendants.

*Ira Shafer*, for appellants.
*S. S. Harris*, for respondent.

ALLEN, J.—By the proceedings in bankruptcy against Yerkes and the assignment of his estate to the plaintiff as his assignee, the attachment at the suit of Bouvier, under which the debt due from the defendant to the bankrupt had been seized,

was absolutely dissolved. It did not require the intervention and action of the court, but by act and operation of law the assignment under the direction of the Court in Bankruptcy of the estate of the bankrupt transferred the property of the bankrupt by relation as of the day of the filing the petition in bankruptcy, and worked a dissolution of the attachment, and a discharge of the lien upon the property attached, the attachment having been issued within four months immediately preceding the commencement of the proceedings under the Act of Congress. (14 U. S. Stat. at Large, 517, § 14; U. S. Rev. Stat., § 5044; *Miller* v. *Bowles*, 10 N. B. R., 515, 58 N. Y., 253.) The payment by the defendant to the sheriff of the debt due Yerkes was without authority, and did not discharge the obligation either to Yerkes or the plaintiff. The lien of the sheriff was discharged, and the payment was voluntary. There was no process against the defendant or his property, neither was there any judgment or order of any court in obedience to which the money was paid. The judgment and execution was a general judgment and execution against Yerkes, and not a judgment specifically subjecting the debt to the payment of the judgment, and requiring the defendant to pay it, or the sheriff to collect and apply it. It is doubtless a hard case for the defendant, who paid the money in good faith without knowledge of the proceedings in bankruptcy, or any notice of their pendency save the constructive notice which every citizen has of that class of proceedings, and supposing that the attachment lien continued. The statute is free from all ambiguity, and courts can only give effect to it, and although it may and frequently does work injustice and compel the payment of debts to the assignee which have been in good faith, and without actual notice of the bankrupt proceedings, paid to the bankrupt, or, as in this case, to a sheriff or other person having a valid lien thereon but for the provisions of the Bankrupt Act, it is the necessary result of the statutory provisions. If others are liable to the plaintiff for the moneys paid by the defendant, he was not compelled to resort to them, but could look to the defendant, the original debtor, who had not discharged his obli-

gation. The sheriff could not probably be sued, being an officer of the court, and receiving the money as such. (*Johnson* v. *Bishop*, 8 N. B. R., 533, 1 Wool., 324; *Bradley* v. *Frost*, 3 Dillon, 457.) It does not appear that the money has ever reached Bouvier, and, if it has not, he would not be liable in an action as for money had and received. Perhaps the defendant may recover the money back, as money paid under a mistake of fact, but that question is not before us. If he cannot, he must submit to the loss.

The judgment must be affirmed.

All concur except *Rapallo, J.*, not voting, and *Miller, J.*, absent.

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N. Y. COMMON PLEAS—SPECIAL TERM.

JANUARY 20, 1879.

**An assignee in bankruptcy cannot be required to give security for costs in an action pending in a State Court, although he is a non-resident of the State.**

**Neither is he personally liable for costs, only where he is guilty of misconduct or bad faith.**

## *HALL, Assignee, &c.*, v. *WATERBURY.*

THIS was a motion made by the defendant for an order to require the plaintiff to give security for costs under the laws of the State of New York as a trustee of an express trust, and also as a non-resident of said State, and for other reasons allowed by the statute and Section 317 of old Code.

*Jacobs & Link*, for the motion.

*C. J. G. Hall*, opposed.

VAN HOESEN, J.—The motion must be denied. An assignee in bankruptcy cannot be required to give security for costs. He is not the trustee of the estate of any debtor within the meaning of the Revised Statutes of the State of New York

(*Ferris* v. *American Ins. Co.*, 22 Wend., 586.) Nor is he, under Section 317 of the Code, personally liable for costs, except where guilty of misconduct or bad faith. (*Read* v. *Waterhouse*, 52 N. Y., 587.) His non-residence is therefore not any reason for requiring security for costs.

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UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

A register has power to adjourn a meeting of creditors when, in his judgment, the interest of the whole body of creditors or of sound policy requires it.

Creditors, when duly convened, have power to choose assignees—to declare dividends—to consider and act upon propositions for a composition. But it is for the register primarily, or for the District Judge, on the register's certificate, to determine when and what meetings shall be held. The register's discretion in such action will not ordinarily be interfered with. A register who, against the remonstrance of the bankrupt's counsel, adjourned a composition meeting in order that creditors might be afforded the option of electing an assignee, was held to have exercised a proper discretion.

## *In re EBENEZER CHENEY and JAMES W. CHENEY.*

THE register certifies that this cause is pending before him under a general order of reference entered on the 2d day of February last; that in obedience to such general order of reference he entered an adjudication and issued a warrant to the marshal to give notice of a meeting of creditors for the choice of an assignee, on the 28th day of March; that, accompanying said general order of reference, a special order of reference was delivered to him, directing him to call a meeting of creditors for the purpose of considering a composition to be proposed by said bankrupts; that he fixed the 28th day of March for such meeting, and gave notice accordingly; that the marshal returned the warrant, certifying thereon that he had caused printed notices to be given, and "that the notices to the creditors were withheld by order of solicitors." That he stated to the meeting it would become his duty, under the provisions of Section 5033, to adjourn the meeting and direct that a new notice be given as

required. He further stated that he thought there was an important object in having both meetings held at the same time, and that unless objection was made he would adjourn the composition meeting to the day to be fixed for the choice of an assignee. Mr. Moore objected on behalf of the bankrupts, and Mr. Warner on behalf of the creditor he represented. No objection was made by Mr. Campau, representing the other two creditors, unless it was to be inferred from his silence that he assented to the objection made by Mr. Moore. These objections, in his judgment, presented a question for determination by the District Judge. He therefore adjourned the composition meeting to the earliest day which, as agreed by the parties, would afford time to obtain the determination of the District Judge, namely, to April 1st, and the meeting for the choice of an assignee to April 17th.

*G. W. Moore*, for bankrupts, presented the following points.

I.

1. In this cause, a "case in bankruptcy was pending," a voluntary petition having been filed by the insolvents.

2. The debtors filed a petition for a composition, and had called a meeting, in accordance with Sec. 5103, Rev. Stat. U. S.

3. On receiving this petition the register, solely of his own motion, assumed the right to make, and had entered an adjudication upon said petition, and called a meeting for the election of an assignee in the cause to be held the same day as composition meeting.

4. The warrant for the meeting to elect assignee was not served, for the reason that no deposit had been made to secure fees and costs. The marshal stating in his return, it was by order of the solicitors of the debtors.

II.

At the day and hour appointed to consider the composition, the register, without request from any creditor or the debtors,

refused to permit any proceedings to be had, for the reason that the warrant for the meeting for the election of an assignee had not been executed, and thereupon solely of his own motion proceeded to adjourn the meeting, against the objections of the debtors and creditors there represented.

To this the following objections are made by the debtors and all the creditors represented.

1. That the composition meeting and proceedings thereupon are absolute rights given by Section 5103 of the Revised Statutes of the United States, the sole condition precedent being that "a case in bankruptcy shall be pending."

2. That a first composition meeting is between the creditors proving claims and the debtors, and the duty of the register is simply to preside and record the proceedings then and there had.

3. That the meeting to elect an assignee has no necessary connection with a meeting to consider composition, and the register erred in so ruling.

4. That, in the absence of well-founded objection made by some creditors authorized to make it, the call for the meeting having been regular, the refusal of the register to proceed was an arbitrary exercise of an assumed power, entailing needless and injurious delays and useless costs.

### OPINION OF THE REGISTER.

The question whether a register has power to adjourn a meeting of creditors, when, in his judgment, the interest of the whole body of creditors, or of sound policy requires it, I should be willing to submit with the briefest possible statement of my views concerning it. I have supposed that it was unquestioned that when presiding at a creditors' meeting he has all the power of the court in conducting the meeting. So far as it concerns the acts which the law authorizes the creditors themselves to perform, he is simply their chairman. He takes and authenticates their votes. But when and where meetings of creditors shall be held, when they shall be adjourned, to what time, and

for what reasons, these are questions which I have always supposed the creditors had no power to determine. As to these they were suitors only; not a court, as they are when electing an assignee, directing the amount of a dividend, or voting upon compositions. Questions of the order of proceeding, adjournment, and the like, primarily must be determined by the register, or if any party requires, by the district judge, when presented to him by the register's certificate. Such has always been my practice, and so far as I know the practice elsewhere.

Other questions, however, in their practical application of much more importance than this, are presented by the issue raised before me, especially as they have been expanded by the "Points" presented by Mr. Moore. These were prepared in response to my request that he should state in writing the grounds on which he denied the power of the register to adjourn the composition meeting with the object named, but they cover a wider field than I anticipated, not, however, without a proper bearing on the subject; and they require of me a fuller treatment than I supposed would be necessary when I authorized him to expect my certificate would be sent in to-day.

I have heretofore, and perhaps more than once, taken occasion to refer to what may be deemed the administrative duties of a register in bankruptcy. Beyond those which may be deemed judicial duties, he is required, as I suppose, to exercise a certain degree of supervision in the conduct of proceedings before him, he is to take care, especially in the important matter of notice to creditors, by every power which the law or the general orders give him, that they are duly informed of all proceedings in which their rights or interests may be involved; and that he is not precluded from taking such action as will promote or secure their interest, because such action is not asked for by the creditors who happen to be represented at the meeting. I think, therefore, that it does not strengthen the objection to the register's action in this instance that it was taken "on his own motion." This objection is first stated in the following form:

"3. On receiving this petition the register, solely of his own motion, assumed the right to make, and had entered an adjudication upon said petition, and called a meeting for the election of an assignee in the cause to be held the same day as composition meeting."

The statement that the order of adjudication was entered on receiving the petition for the composition meeting under the provisions of Section 5103, would probably not have been made if the record had been carefully examined. The adjudication was not made upon the petition for a composition meeting, but upon the general order of reference which was delivered at the same time with the special order, and which expressly directs the register "to make adjudication thereon." It will further appear how unreasonable the allegation is that the call of a meeting for the election of an assignee was the assumption of a right by the register when Section 5019 requires the warrant to be issued "forthwith," and General Order IV. commits to the register the conduct of the proceedings.

Quite as unreasonable, I think, is the allegation that the refusal of the register to proceed to take the votes of the three creditors present upon the proposition for a composition "was an arbitrary exercise of an assumed power." The excitement of counsel must be great when he is unable to restrain the expression of such a charge as this, and with the deliberation also which putting it in writing implies; for, if this was "an arbitrary exercise of an assumed power," the counsel who so charges has precluded himself from conceding that the register acted from a mistaken sense of duty. I should be sorry to think that this was intended, but I must be allowed to insist, however, that if I have exceeded my duty it has been from no purpose or desire to wrong the bankrupts in this case. It so happens that I know nothing but good of either of them. I have no reason to doubt that their purpose to obtain a composition with their creditors is actuated by entirely honest motives. But I am unable to see that this should allow me to apply any other rule in the conduct of the proceedings, so far as I am able to control them, than I would apply to any and all similar

cases. And this leads me to consider the reasons why I deem it important that creditors, when called to consider a proposition for a composition, shall have the alternative, if they choose to exercise it, of electing an assignee, either for the purpose of defeating the composition, or of obtaining the aid of an assignee, appointed by themselves, by whose investigations they may be able to judge of the fairness of the offer.

There are, however, two preliminary considerations to be noted.

1st. It requires but small observation of the course of composition cases in bankruptcy, to be convinced that the positive provisions of the law for the protection of creditors against unfair or dishonest compositions are few and weak; and it therefore becomes the duty of the court to exercise not only its power but its ingenuity in conducting the proceedings, so as to afford ample opportunity for the creditor to be heard, and under circumstances which will secure to them the freest action. The court, therefore, ought not to permit a practice, if the law affords power to prevent it, which will put the creditors at a disadvantage, the key to which is held in the hands of the bankrupt.

2d. It must be expected that attorneys for bankrupts will seek to gain for them all advantages possible under the law; and if they can so load the issue or present embarrassing alternatives to operate in favor of their clients, of course they will do it. That is what they are employed for; and in some cases all they are employed for. It is the business of the court, as I view it, and especially of the register, to see that no sinister advantage is allowed to either party.

With these preliminary considerations in view, I think the court never will construe the language of Sec. 17, Act of 1874 (Sec. 5103 A), which authorizes composition proceedings in cases where an adjudication has not been had, to require the entry of an adjudication in a voluntary case to be suspended, and all the proceedings consequent upon an adjudication in such a case as directed by Secs. 5019, 5033, and 5034 to be stayed. The clause " whether an adjudication in bankruptcy shall have been

had or not," could only have been intended for involuntary cases, to authorize composition proceedings in the interval between the filings of a petition for compulsory bankruptcy, while its allegations were denied, and the time was running for a hearing upon them. I do not understand that even in such a case it is a statutory right of an alleged bankrupt to have a composition meeting called. That must be in the discretion of the court. But it is going much further to affirm that, in a voluntary case, it is the right of the bankrupt to have the proceedings which the statute directs suspended—such, for instance, as the requirement to issue the warrant "forthwith" —while the composition proceedings go forward. But the claim on behalf of the bankrupts here goes beyond even this. Their solicitor claims the right to countermand the order contained in the warrant to send notice by mail to the creditors named in it. Such is the return of the marshal as it stands. Nor is it substantially changed if the return be amended to show the bankrupts only refused to furnish the marshal with necessary fees to perform the service he was required by his warrant to render. That would be only an indirect mode of accomplishing the fact just as it now stands in the return. And if the court have no other power to prevent this unauthorized interruption of the service of its process, it can at least prevent the advantage sought to be gained by such interference. How much this advantage is worth to a body of creditors—of having an alternative before them of choosing an assignee or accepting an offered composition—it may not be easy to estimate. I have seen cases where I thought it was highly appreciated; cases, too, where, by the investigation of an assignee, the composition offered was in the end accepted; another, where a proposition for a composition was withdrawn on the exhibition of opposition to it by the creditors, who immediately proceeded to the choice of an assignee, under whose management the dividend paid was more than double the composition offered. That there is an advantage to bankrupts seeking a composition to have that proposition presented by itself I am assured by the efforts made so to direct the pro-

ceedings that the meetings shall be separate; and the advantage is greatest when a composition meeting is held before the meeting for the choice of an assignee is called. There is an element of uncertainty in point of time as to when an assignee can be obtained which operates to influence creditors to accept the composition offered, even while expressing dissatisfaction with it. I have observed that sometimes the effort to separate the meetings is attempted in one way, and sometimes in another. The saving of expense, which is alleged as the reason in this, as it has been in other cases, for holding the composition meeting first and by itself, does not strike me as entitled to the force which is assumed for it. That expense in this case, in addition to that actually incurred by a partial service of the warrant, would have been from eight to ten dollars. I am persuaded that attorneys for bankrupts seeking composition see, as I do, the advantage of this method of procedure. It is an advantage properly, perhaps, within their professional duty to their clients to gain if they can; as it is, in view of what I think to be the evils of it, and, as I understand my duty, to prevent it if I can. I am not sorry that the question has been presented, that the practice may be settled in this district; and that all officers of the court may be informed whether or not it is competent for them to accept from the attorneys of a bankrupt directions as to the manner of performing duties specifically directed by the statute or by the general or special orders of the court.

All which is respectfully submitted.

HOVEY K. CLARKE, *Register in Bankruptcy.*

BROWN, J.—I think the register presents strong reasons why the ordinary proceedings in bankruptcy should not be stayed on account of the pendency of a petition for a composition. The cases of *In re Proby* (17 N. B. R., 175) and *In re Holmes & Lissberger* (12 N. B. R., 86) are authorities for holding that the register has power to adjourn a meeting, and in view of the facilities for fraud afforded by composition proceedings, I am not disposed to deny the power or interfere with the discretion

of the register in directing a meeting at which the creditors may exercise their option of accepting a composition or electing an assignee.

In issuing a warrant "forthwith," the register simply obeyed the mandate of the law (Sec. 5019), and I am loth to say that the bankrupt may defeat the election of an assignee, and at the same time compel the creditors to pass upon the propriety of a composition, by neglecting to provide for the expense of serving the warrant.

There may be cases where the absence of all suspicious circumstances, and the probable rapid depreciation of property, may suggest to the register the propriety of overlooking the mistake of counsel, and of holding the composition meeting before the general meeting called for the election of an assignee, but I would not interfere with his discretion in that regard.

The order and opinion of the register are affirmed.

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## UNITED STATES SUPREME COURT.

### OCTOBER TERM, 1878.

**Circuit Courts have no jurisdiction, under Section 4979 U. S. R. S., of an action by a creditor against an assignee in bankruptcy, the bankrupt, and others to reach property fraudulently concealed or conveyed by the bankrupt.**

**A creditor cannot maintain an action in his own name to recover the property or rights of property of the bankrupt even where the assignee refuses to proceed after being requested so to do.**

**Assignees of a bankrupt are not, in certain cases, bound to take property of an onerous or unprofitable character, which would burden instead of benefiting the estate. Nor in such cases are creditors without a remedy, as they may, by petition, apply to the court to compel the assignee to carry out their wishes.**

## *GLENNY* v. *LANGDON et al.*

THE facts appear sufficiently in the opinion.

CLIFFORD, J.—District Courts of the United States are constituted courts of bankruptcy, and as such they have original

jurisdiction in all matters and proceedings in bankruptcy, with power to hear and adjudicate the same according to the provisions of the Bankrupt Act.

Jurisdiction of those courts in that regard extends as well to the collection of all the assets of the bankrupt as to all cases and controversies between the bankrupt and any of his creditors, and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the bankruptcy proceedings. (14 Stat. at Large, 518; Rev. Stats., Sec. 4972.)

Creditors appoint the assignee, and the provision is that as soon as he is appointed and qualified, the judge, or, when there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and that such assignment shall relate back to the commencement of the proceedings in bankruptcy; the express enactment being that by operation of law the title to all such property and estate, both real and personal, shall vest in such assignee. (Id., Sec. 5044.)

Explicit, comprehensive, and unqualified as the words of the provision are, still the instrument of assignment is made even more extensively operative by what follows in the same section of the original enactment, which provides that all property conveyed by the bankrupt in fraud of his creditors, . . . and all his rights of action for property or estate, real or personal, and all other causes of action arising from contract or from the taking or detention or injury to the property of the bankrupt, . . shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee. (14 Stat. at Large, 523; Rev. Stats., Sec. 5046.)

Sufficient appears to show that certain debtors of the complainant and other creditors failed in business, and made, under the State Law, a general assignment of their property to an assignee for the benefit of their creditors, prior to their

being adjudged bankrupts. Pursuant to that assignment the assignee accepted the trust and converted all of the visible property of the insolvents surrendered to him into money, and made final distribution of the proceeds among the creditors.

Charges of fraud against the debtors are made by the complainant, to the effect that they concealed large amounts of other property from their creditors and from the assignee, as fully set forth in the bill of complainant.

On the 10th of August, 1867, one of the said debtors filed his petition in bankruptcy, and on the 11th of October following the firm, of which the first-named debtor was a partner, also filed their petition in bankruptcy, and the firm and each partner were duly adjudged bankrupts, the respondent, J. W. Caldwell, being subsequently appointed assignee in each case. They, the bankrupts, surrendered no property, and made oath that they had none not excepted from the operation of the Bankrupt Act. Discovery has since been made, as the complainant alleges, that the bankrupts had fraudulently concealed a large amount of property not surrendered to the State assignee or the assignee in bankruptcy, and that one of the firm made large gains and profits subsequent to the assignment under the State Law, and prior to the time when the firm was adjudged bankrupt.

Secret and fraudulent devices, as the complainant alleges, were employed by the insolvent debtors to conceal their property from the knowledge of their creditors and the assignee, and he describes the means which led to the discovery of the property, and avers that the respondent assignee was advised of the facts set forth, and that he was requested to adopt means to recover the same or to allow his name to be used for that purpose, but that he refused so to do.

Both the complainant and respondents are citizens of the same State, but the complainant, being a creditor of the bankrupts, instituted the suit in his own name, claiming the right to do so because the assignee refused to proceed to recover the property or to allow his name to be used for that purpose. Service was made and the respondents appeared and demurred

to the bill of complaint, showing, among other things, the following causes: 1. That the complainant has no capacity or right in equity to bring the suit. 2. That the complainant has never proved his claim against the estate of the bankrupts.

Beyond all doubt the suit in this case is brought to recover property conveyed by the bankrupts in fraud of their creditors, which, by the express words of the Bankrupt Act, vested in the assignee by virtue of the instrument of assignment executed at the time the assignee was appointed.

Jurisdiction of the Circuit Court in the case cannot be sustained upon the ground of the citizenship of the parties, as the record shows that the complainant and respondents are citizens of the same State; nor can it be upheld under the provisions of the Bankrupt Act which provides that the Circuit Courts shall have concurrent jurisdiction with the District Courts of all suits at law or in equity brought by an assignee in bankruptcy against any person claiming any adverse interest, or by such person against an assignee touching any property or rights of the bankrupt transferable to or vested in such assignee, for the plain reason that controversies, in order that they may be cognizable under that provision, either in the Circuit or District Court, must have respect to some property or rights of property of the bankrupt transferable to or vested in such assignee; and the suit, whether it be a suit at law or in equity, must be in the name of one of the parties described in the provision, and be against the other, as appears by the express words of the provision. (*Smith* v. *Mason*, 6 N. B. R., 1, 14 Wall., 419; *Morgan* v. *Thornhill*, 5 N. B. R., 1, 11 Wall., 65.)

Nor is there anything in the case of *Clark* v. *Clark et al.* (17 How., 315) inconsistent with the preceding proposition, when that case is properly understood. By the pleadings and proofs it appears that the debtor had a large claim against Mexico pending before commissioners prior to the time he filed his petition in bankruptcy; that he was adjudged bankrupt before his claim was allowed; that the description of the claim in his schedule of assets was not such as to render it available to his creditors; that the assignee, having been empowered

to sell his assets, sold the same to the sister of the bankrupt for a nominal sum, and that she immediately reconveyed the same to her brother; that he, the brother, subsequently prosecuted the claim and recovered the same to the amount of sixty nine thousand, four hundred and twenty-nine dollars and four cents, which was paid into the national treasury; that his brother, a judgment creditor, for himself and others, filed a bill of complaint here in the Circuit Court against the bankrupt, claiming the fund, the assignee having died before the same was recovered. Immediate steps were taken to procure the appointment of a new assignee, which appointment was made by the proper District Court without delay, and the case shows that he forthwith petitioned the Circuit Court here to be admitted a party complainant in the said bill of complaint, and that he claimed the fund. Hearing was had and the Circuit Court admitted the new assignee as a party complainant and enjoined the Secretary of the Treasury not to pay out the fund until the further order of the court, and finally decreed that the fund belonged to the newly-appointed assignee. Appeal was taken by the bankrupt, and this court affirmed the decree of the Circuit Court.

Nothing was decided in that case, except that the newly-appointed assignee was a proper party complainant in the bill filed by the bankrupt, subsequent to the decease of the original assignee, and before his place was filled by a new appointment, and that the fund belonged to the successor, as the representative of the bankrupt estate. Further litigations followed, which show to a demonstration that neither the bankrupt nor any creditor could maintain any such suit. (*Clark* v. *Hacket*, 1 Cliff, 269, 1 Black., 77.)

Suppose it to be true, as alleged, that the described property and rights of the bankrupts, which form the subject-matter of the present controversy, were transferred to and vested in the assignee, it by no means follows that the Circuit Court has jurisdiction of the case, or that the complainant can maintain the suit; as it is clear to a demonstration that the instrument of conveyance referred to, did not vest the property, or

any right to recover the same in the complainant or his associate creditors; nor is the claim which he makes to the property, in any legal sense, adverse to the rights of the assignee. What the complainant claims, as against the assignee, is that he, the assignee, refused to institute the suit, or to allow his name to be used for the purpose. He claims no interest in the property of the bankrupt adverse to the assignee, and if he did, the claim could not be sustained for a moment, as the entire property is transferred to the assignee, to be converted into money for distribution.

Unless the assignee can collect what is due to the bankrupt he can never perform the duty assigned to him as the representative of the bankrupt, and the first Section of the Bankrupt Act expressly provides that the jurisdiction of the District Courts shall extend to the collection of all the assets of the bankrupt, and to all acts, matters, and things to be done under and in virtue of the bankruptcy.

"Debts due" to the bankrupt, as well as all his rights of action, vest in the assignee, by virtue of the adjudication in bankruptcy and the appointment of the assignee, as the representative of the bankrupt. (*Shearman* v. *Bingham*, 7 N. B. R., 490.)

Power and authority are also vested in the assignee, by virtue of the bankruptcy and his appointment, to manage, dispose of, sue for and recover all his property or estate, real or personal, debts or effects, and to defend all suits at law or in equity pending against the bankrupt. (14 Stat. at Large, 523.)

Congress, in framing the Bankrupt Act, it is believed, intended to provide instrumentalities for its complete execution, and such as are sufficient to carry it into full effect. State Courts may, doubtless, exercise concurrent jurisdiction with the District Courts in certain cases for the collection of assets not inconsistent with the Bankrupt Act, but Congress, in the judgment of the court, intended to provide the means for the execution of the law in all cases, even though the State Courts should refuse to exercise jurisdiction in such cases. (*Lathrop* v. *Drake*, 13 N. B. R., 472, 1 Otto, 516.)

Support to that proposition is found in the fact that the assignee is authorized, under the order of the court, to redeem or discharge any mortgage, or conditional contract, or pledge, or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance thereof, or to sell the same subject to such mortgage, lien, or other encumbrances, the provision being that the debtor shall, at the request of the assignee, and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt.

Other provisions of the Bankrupt Act forcibly confirm the same views, two of which will be mentioned: 1. That the assignee shall demand and receive from any or all persons holding the same, all the estate assigned or intended to be assigned, real or personal, and shall sell all such as is unencumbered which comes to his hands, on such terms as he thinks most for the interest of the creditors, subject to the right of the court for cause shown to make such order concerning the time, place, and manner of sale, as will, in its opinion, promote those objects. 2. That the assignee shall have the like remedy to recover all said estate, debts, and effects in his own name as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. (14 Stat. at Large, 524.)

Bankruptcy courts have original jurisdiction in their respective districts of all matters and proceedings in bankruptcy, and are authorized to hear and adjudicate upon the same, according to the provisions of the Bankrupt Act. They have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the Circuit Courts now have in any suit pending therein in equity.

Assignees are in the first instance chosen by the creditors, but they may be removed by the court, after due notice, for any cause which, in the judgment of the court, renders such removal necessary or expedient. (14 Stat. at Large, 525.)

Authority for a creditor to bring suit to recover the property or rights of property of the bankrupt under any circumstances is certainly not given in the Bankrupt Act, nor is any such pretense set up by the complainant. Instead of that he admits, what cannot be denied, that the entire property of the bankrupt, except what is reserved from the operation of the Bankrupt Act, vests in the assignee by virtue of the instrument of conveyance required to be made as soon as the assignee is appointed and qualified.

Due conveyance of the kind was made in this case, nor does he attempt to controvert the proposition that the assignee is the only party designated by the Bankrupt Act as the proper claimant of the bankrupt's property and estate. The grounds of recovery, as stated in the bill of complaint, are that before filing the same he made application to the assignee to proceed by bill in chancery or other proper mode, or allow his name to be used for the purpose, to subject the said property and rights of the bankrupt, fraudulently concealed and retained, and to convert the same into money, to be paid and distributed to the creditors, which he, as such assignee, declined and refused to do.

Viewed in the light of those allegations, the theory of the complainant is that the assignee, inasmuch as he refused to comply with the request and declined either to bring the suit or to allow his name to be used to recover the property and rights of property of the bankrupt, was guilty of a fraud against the creditors, and that the latter, by virtue of such request and refusal, had a right to seek a remedy in their own names, not only against the bankrupt and the possessor of the concealed property and estate, but also against the assignee, who is deemed to be responsible for the concealed property. Such a remedy, it is conceded, does not grow out of or depend upon the Bankrupt Law, but the argument is that it is founded upon the enlarged principles of equity which adapt themselves to the exigencies of the case, and enable the court to mould the decree to suit the various equities arising between the parties to the litigation.

Authorities are cited to prove that the person for whose benefit a trust is executed, who is to be the ultimate receiver of the money, may maintain a suit in equity to have it paid to himself, and the proposition is advanced that where a trustee is guilty of what the law considers a breach of trust in regard to the trust property, the *cestui que trust* may invoke the aid of equity to give him such remedy in the premises as the circumstances may require.

Grant that and the concession shows to a demonstration that the present suit cannot be maintained, as the record shows that the complainant and respondents are citizens of the same State, and of course the Circuit Court had no jurisdiction of the case, it being conceded by the complainant that the remedy sought does not grow out of or depend upon the Bankrupt Law.

Conceded or not, it is clear that the suit in this case finds no support in the provisions of the Bankrupt Act, as sufficiently appears from the references to that act already made, but, if more be needed, it will be found in the section which provides that no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined. (Rev. Stats. Sec. 5106.)

Appellate jurisdiction, as exercised under the twenty-second section of the judiciary act, is not conferred upon the Circuit Courts in any case under the Bankrupt Act where the ruling, order, decision, or decree of the Circuit Court is made or rendered by that court in a summary way. All such rulings, orders, decisions, or decrees must be revised, if at all, under the first clause of the second section of that act, in respect to which the determination of the Circuit Court is final and conclusive. (*Knight* v. *Cheney*, 5 N. B. R., 305; *Morgan* v. *Thornhill*, 5 N. B. R., 1, 11 Wall., 65.)

Creditors can have no remedy which will reach property fraudulently conveyed, except through the assignee, for two reasons: 1. Because all such property, by the express words of

the Bankrupt Act, vest in the assignee by virtue of the adjudication in bankruptcy and of his appointment. 2. Because they cannot sustain any suit against the bankrupt.

Property fraudulently conveyed vests in the assignee, who may recover the same and distribute its proceeds as the Bankrupt Act requires. Such a conveyance, says Curtis, is no effectual conveyance as against the interest intended to be defrauded, which is represented by the assignee, so far as respects all creditors who prove their claims. They can have no remedy which will reach such property except through the assignee, not only for the reasons already assigned, but because their remedies are absorbed in the great and comprehensive remedy under the commission by virtue of which the assignee is to collect and distribute among them the property of their debtor, "to which they are so justly and legally entitled." (*Carr* v. *Hilton*, 1 Curt. C. C., 230.)

Opposed to that proposition is the case of *Franklin* v. *Farr* (2 Eq. Cas. Abr., 102), in which it was held that if the assignee refuses to bring a bill that is for the benefit of the bankrupt's estate, the creditor has the right to bring such a bill under peril of costs.

Enough has been already remarked to show that the Bankrupt Act makes it the express and positive duty of the assignee to collect and distribute all the assets of the bankrupt, including property fraudulently conveyed prior to the decree of bankruptcy, and that authority is given to him to sue for the same under the direction and control of the court, which may in its discretion and for good cause shown require the assignee by a specific order to take any proper step to secure the due administration of the Bankrupt Law and the full and complete protection of the rights of the creditors interested in the proceedings; that ample means are placed in the hands of the creditors to enable them to inform the court of the necessity of any particular proceeding to be taken for that purpose: to which it may be added that the power of the court to compel a compliance with any such order is plenary and beyond all doubt, or if the assignee fails to do so, to punish him for contempt, or to

remove him and appoint another in his place. (Bump on Bankruptcy, 10th ed., 147.)

Plenary as the powers granted to the Bankrupt Courts are, there is no occasion for any departure from them in order to the complete execution of the duties imposed, which of itself is a sufficient reason for holding that the rule laid down in the preceding case is not applicable in our bankrupt system. (Rev. Stats., sec. 5,039.)

Neither the assignee nor any creditor can have any greater right under the Bankrupt Act than the act itself confers, and if it be conceded that the remedy sought in this case does not depend upon the Bankrupt Act, then it is clear that the court below had no jurisdiction of the case, unless the proposition can be sustained that such a suit may be maintained in a Circuit Court, where both parties are citizens of the same State.

Nor is that the only objection to the theory advanced by the complainant; for if one creditor may sue in such a case, then all may sue, and the result might be that the proceedings in bankruptcy would be transferred not only to the Circuit Court but to every State Court within whose jurisdiction a defendant may reside.

Even if the case referred to, and others of like character, were good law in the courts of the country where they were made, still it is clear that the question before the court must be controlled by the provisions of our Bankrupt Act; but the doctrine of that case has long since been overruled and is no longer regarded as correct, even in the jurisdiction where it was made, of which there is abundant evidence.

Creditors of an insolvent, said Lord Cottenham, cannot maintain a suit to recover the property or rights which belong to the insolvent, and the same rule applies to suits for a similar object brought by the insolvent himself. (*Heath* v. *Chadwick*, 2 Phillips, 649.)

*Prima facie* the bankrupt is divested of the whole estate, nor have the creditors any right to sue; but if it be represented that the assignees will not sue, the court having original jurisdiction of the matter may direct the recusant assignees to pro-

ceed, or may give the bankrupt or a creditor the right to institute the suit in the name of the assignee, first indemnifying the assignee against costs. (*Benfield* v. *Solomons*, 9 Ves., 83.)

Attempt to maintain such a suit was made in *Hewins* v. *Robinson* (11 Simons, 105), but the assignees demurred to the bill of complaint and the court sustained the demurrer, holding that the true method to proceed in such a case was to apply to the court of insolvency to have the assignees removed and others appointed in their place.

Application was made to the court in the case of *Ex parte* Ryland, and the petitioning creditor was allowed by the court to sue in the name of the assignee, first giving the assignee indemnity against cost and damage. (2 Deac. & Chit., 393.) Corresponding decision was made in the case of *Hammond* v. *Attwood* (3 Madd., 158), the court holding that the proper course was to apply to the court by petition to have the assignees removed and new assignees appointed. (*Mayor* v. *Aukland*, 3 Hare, 77.)

Bankrupts uncertificated cannot file a bill of complaint against their assignees for an account, nor can the bankrupt obtain such relief by charging fraud and collusion between the assignees and a third party, the true remedy being a petition for relief to the court of original jurisdiction. (*Tarleton* v. *Hornby*, 1 Young & Coll., 193.)

Suffice it to say that the law is now well settled in the parent country that creditors cannot maintain any such suit against the assignee for the purpose set forth in the present bill of complaint.

Strong support to the conclusion is also derived from the fact that cases arise in bankruptcy proceedings where the assignee is not bound to take possession of some particular asset which passed to him by the instrument of assignment. Examples of the kind, such as certain leasehold estates which would burden instead of benefiting the fund to be distributed, are given by Judge Ware, in the case of *Smith* v. *Gordon* (6 Law Rep., 313), to which reference is made, as showing the principle of the rule.

Leasehold estates pass to the assignee under the English Bankrupt Laws, but the assignee, in certain cases, is not bound to take the lease of the estate where the rent is greater than the value of the lease, as the effect would be to burden the estate of the bankrupt, and to diminish the fund to be distributed among the creditors. (*Copeland* v. *Stephens*, 1 Barn. & Ald., 604; *Amory* v. *Lawrence*, 3 Cliff., 535; *Fowler* v. *Down*, 1 Bos. & Pull., 157; *Webb* v. *Fox*, 7 Term, 397; *Wilkins* v. *Fry*, 1 Meriv., 269.)

It has long been a recognized principle of the Bankrupt Law, says Robson, that the assignees of a bankrupt are not, in certain cases, bound to take property of an onerous or unprofitable character, which would burden instead of benefiting the estate, and there are numerous decisions, English and American, which support the proposition; nor are the creditors without remedy in such a case, even if the assignee should erroneously or unwisely fail to take such possession, as the creditors may by petition apply to the court of original jurisdiction to compel him to carry out their wishes; and if the District Court should deny their petition, they would have the right to demand a review of the decision by the Circuit Court under the first clause of the second section of the Bankrupt Act. (Robson, 3d Ed., 398.)

Decree affirmed.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

DECEMBER 18, 1878.

On the first of October, 1877, T. & W., copartners under the firm name of T. & Co., being then insolvent, made an assignment for the benefit of their creditors, but the signature and assent of the assignee was never obtained. On October 10, 1877, a paper was executed by T. & W., dissolving the firm and providing that all the assets were to be transferred to T., who agreed to assume all the debts. No notice of the dissolution was given, and the business was continued as theretofore under the old firm name. On October 23, 1877, T. made an assignment for the benefit of creditors to the same assignee. T. & W. having been adjudged bankrupt on a petition filed January 3, 1878, the assignment was set aside as in fraud of the Bankrupt

**Law.** The assets which came in the hands of the trustee in bankruptcy were wholly from property formerly of the firm. T.'s individual debts exceeded one hundred thousand dollars. On application by the trustee for instructions as to the distribution of the assets, *Held*, That the transaction between T. & W. was invalid as to the firm creditors, and that the assets in the hands of the trustee must be held to be firm assets, to be distributed accordingly.

## *In re FRANCIS TOMES et al.*

THE facts appear fully in the opinion.

*P. H. Vernon*, for trustee.
*Wm. S. Opdyke*, for firm creditors.
*F. P. Forster*, for Tomes' creditors.

CHOATE, J.—This is a petition by the trustee of the bankrupts, asking the instructions of the court as to the distribution of the assets. The bankrupts, Tomes and Watson, copartners under the firm name of Francis Tomes & Co., were adjudicated bankrupts upon the petition of their creditors, which was filed January 3, 1878. Prior to October 10, 1877, they had done business as a firm for several years, as importers and traders in guns and other military goods.

During the year 1876 they met with heavy losses, and from the end of that year certainly the firm was embarrassed. During the year 1877 its condition grew constantly worse, and on the first of October, 1877, it was clearly insolvent, and known so to be by both partners. They were carrying about forty thousand dollars of paper, which had mostly been renewed from time to time, and which they had no available means of meeting, except by fresh discounts. They had about thirty-five thousand dollars of debts on open accounts, nearly all of which was overdue, and payment of which had been demanded, a considerable part of it having been due for six months. Watson had no individual assets or individual debts of any account, but Tomes was carrying a very large amount of real estate heavily mortgaged. In this position of affairs, on or about October 1, 1877, they executed a general assignment of all their property, partnership and individual, for the benefit of their creditors,

without preferences, the firm property to be distributed among their firm creditors, the individual property among their individual creditors respectively, and placed it in the hands of their attorney for him to procure the assent and signature of the assignee named therein, but his signature never was obtained. This assignment recited their insolvency. On October 10, 1877, Tomes & Watson executed a paper, whereby it was agreed that the partnership was dissolved, and that all the firm assets were transferred to Tomes, and he assumed all the debts of the firm. This agreement was kept secret between them. There was no publication of the dissolution. No notice was given to creditors. The books were not changed. The sign of the partnership was kept up. So far as appears, no new arrangements for credit or capital were made for continuing the business. On October 22, 1877, Tomes made an alleged assignment to the same assignee for the benefit of his creditors, reciting his insolvency, and also reciting the agreement of October 10, 1877. Although all the creditors have had notice of this application, and an opportunity to produce testimony, and the two classes of creditors, firm and individual, have been represented in the proceedings upon the reference, Tomes has not been called as a witness.

The assignment of October 22, 1877, has been set aside as in fraud of the Bankrupt Law.

The proceeds of the property that have come into the hands of the trustee are wholly from the property formerly of the firm. Aside from this there are no individual assets. The firm debts are about seventy-seven thousand dollars. Tomes' individual debts seven thousand dollars, besides ten thousand dollars on bond and mortgage, over and above the estimated value of the security. His liability on bond and mortgage is about one hundred thousand dollars.

The question is whether the proceeds of the property, formerly of the firm, but transferred to Tomes by the agreement of October 10, 1877, are to be treated as his individual property for the purpose of distribution under the Bankrupt Law, or as firm property. If the former, all the creditors will share in it;

if the latter, it must be applied to the payment of the firm debts.

There is no doubt that a partner may make a valid agreement with his co-partner, dissolving the firm and transferring all the assets of the firm to his co-partner, provided this assignment be made in good faith and for an adequate consideration, and the effect of such transfer will necessarily be, in case bankruptcy inures, to give individual creditors of the partner to whom the transfer is made a great advantage in the distribution of the estate. (*In re* Long & Corey, 9 N. B. R., 227, 7 Ben., 141.) And it seems that the rule is not otherwise, though the firm was, in fact, insolvent at the time. (Same case and cases cited therein, especially *Howe* v. *Lawrence*, 9 Cush., 553.) But to the validity of such a transfer, as against the firm creditors, it is essential that it be *in good faith*, which requirement certainly includes that it be not designed, in contemplation of the distribution of the estate in bankruptcy or insolvency, to divert from them the firm assets to the individual creditors of the partner taking the transfer. (Same cases.)

Now, in the present case, there is no reasonable conclusion to be drawn from the facts except that the agreement of October 10, 1877, was made in immediate contemplation of the winding up of the estate and the distribution of the assets in insolvency, and with the design of diverting the firm assets from the firm creditors for the benefit of the individual creditors of Tomes. The first general assignment, which did not go into effect, shows that by the 1st of October both Tomes and Watson knew that they were insolvent, and that it was impossible to continue in business in the circumstances in which they then were placed.

There is no reason to believe that they then had any other purpose or intention than that which that assignment was calculated to carry into effect. How far does the evidence show that that purpose was afterwards altered? There was no change of the circumstances, making the continuance of the business any more practicable afterwards. On the contrary, with the lapse of time, things were getting constantly worse. Then, on the 10th of October, they signed this agreement of dissolution.

Is there any reason to believe, from this agreement and the acts of the parties in relation to it, and from the surrounding circumstances, that this was intended in good faith on Tomes' part with a real purpose to continue the business on his own account, which had been before carried on by the firm, and to pay the debts which he assumed.

All the indications are the other way. If such had been his purpose, why should he not have advertised the dissolution and notified the creditors, opened new books, or new accounts in the old books? The change was kept secret, and in twelve days afterwards he made an assignment for the benefit of his creditors, bringing the property transferred to him by the firm into his individual estate. In fact, as soon as this change was made, he was, for the purpose of carrying on the business, in a worse condition than the firm had been; for, while he had the same assets as the firm, his debts became much larger than the debts of the firm had been. Nor can it be believed that, as between Tomes and Watson in the existing condition of Tomes' affairs, it could have been thought possible that he could go on with the business and pay the debts. The great inadequacy of the consideration, the debts assumed being largely in excess of the assets to the knowledge of both partners, also throws great suspicion upon the transaction, and tends to show that it was not a real transaction intended for the purpose which appears on its face.

The real purpose of the transaction appeared clearly when, twelve days later, Tomes made the second assignment.

The carrying on of the business for twelve days was for the purpose of giving an appearance of reality to the transaction, but it does not overcome the force of all the circumstances which tend to show that these partners never gave up from the 1st of October the purpose of having their affairs wound up in insolvency, although they did intend to change the mode of distributing their assets as between individual and firm creditors from that at first projected. The failure of Tomes to testify is also a strong circumstance against the *bona fides* of the transaction.

The case is not to be distinguished from the cases of *In re* Byrne (1 N. B. R., 464) and *In re* Cook (3 Biss., 122), and is in entire accordance with the case of *In re* Long (*ut supra*), where the transfer was held to have been made in good faith.

(See also *Ex parte* Burton, 1 Gl. & J., 207; *Ex parte* Usborm, id., 358; *Ex parte* Ruffin, 6 Ves., 119; *Wilson* v. *Robertson*, 21 N. Y., 587.)

The assets in the hands of the trustee must be held to be firm assets, to be distributed accordingly.

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UNITED STATES DISTRICT COURT—W. D. TENNESSEE.

JANUARY 11, 1879.

**A plain and not extravagantly costly watch is properly allowed to a commercial man under Section 5045 R. S., as a necessary article.**

## *In re STEELE.*

THE facts appear sufficiently in the opinion.

HAMMOND, J.—By agreement between the assignee and the bankrupts, the question is submitted for the opinion of the court, as if on certificate of the register, whether or not the refusal of the assignee to allow them each his gold watch as exempt property, is proper under the circumstances set out in the agreement of facts. John Steele has been allowed, and claims no exemption except this watch, which is described as "a plain, old style single-case gold watch, which he has owned for twenty-five years or more, and which would scarcely sell for twenty-five dollars." R. L. Steele has been allowed household furniture worth not more than one hundred dollars. The kind and value of his watch is not stated.

The decisions on this subject are conflicting. I have examined a good many cases on the general subject, and find that the conflict grows out of the diverse views as to whether the

particular articles claimed are necessaries or luxuries, useful or only ornamental. It is said in *Montague* v. *Richardson* (24 Conn., 338), that each case must depend upon its own peculiar circumstances. I think this is a correct view, and that in some cases the assignee may and should allow a watch or other time-piece, and in others he should not. These parties were a firm of merchants, and their valuable assets had been surrendered to their creditors. They proposed to engage again in commercial pursuits. It was held in *Harrison* v. *Mitchell* (13 La. Ann., 260) that a desk and iron safe were exempt as necessary implements to carry on the business of a commercial man.

It would not be doing any great violence to the meaning of the term "wearing apparel" as used in the Bankrupt Act, to include in it a gold watch of moderate value. The definition of the word "apparel," as given by lexicographers, is not confined to clothing; the idea of ornamentation seems to be a rather prominent element in the word, and it is not improper to say that a man "wears" a watch or "wears" a cane. The exemption law of Arkansas says that "wearing apparel shall be exempt, except watches." (Ark. Dig., 503, 504; James' Bankruptcy, 58; Avery & Hobbs' Bankr., 68.) In *Peverly* v. *Sayles* (10 N. H., 356), under a statute which exempted "wearing apparel necessary for immediate use," it was held that an overcoat and a suit of clothes "to go to meeting in" were included. In *Ordway* v. *Wilbur* (16 Me., 263), cloth sent to a tailor to be made into clothes was in that form held to be exempt as "apparel."

In *Bumpus* v. *Maynard* (38 Barb., 626) the debtor was in bed—his clothes were on a chair, and his watch on a table. The officer was sued for refusing to levy on them, and it was held that they were exempt as "wearing apparel," notwithstanding they were not on the person. There are some expressions in the case which indicate that possibly the court did not intend to include the watch as "wearing apparel," but it is probable they did. It was decided in *Smith* v. *Rogers* (16 Ga., 479) that a watch was not wearing apparel. But in *Mack* v. *Parks* (8 Gray, 517) it was held, in a case where an officer with an

attachment asked the debtor to let him look at his watch, and being permitted tore it from his person by breaking the cord to which it was attached, that the watch was exempt from seizure at common law, because by that law wearing apparel on the person was exempt from levy or distraint. (See Freeman on Ex., Sec. 232.)

We have no State statute in Tennessee, that I can find, exempting wearing apparel, and we depend on this common law principle for immunity in such cases. It is said in *Richardson* v. *Duncan* (2 Heisk., 220) that our exemption laws are to be liberally construed, and that is the universal doctrine of modern times. In that case it was held that an "ass" is included in the statute which exempts "a horse, mule, or yoke of oxen;" and in *Webb* v. *Brandon* (4 Heisk., 285) an ox-wagon is included in the description—"one two-horse wagon."

But, whether a watch may be included in the statutory exemption of "wearing apparel" or not, it certainly may be allowed as "other necessaries" under certain circumstances.

The act (Rev. Stat., 5045) says: "There shall be excepted from the operation of the conveyance the necessary household and kitchen furniture, and such other articles and necessaries of the bankrupt as the assignee shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars." Under this clause the late Judge McDonald, of the District of Indiana, held in *Re* Thiell (4 Biss., 241) that a cheap watch might be included, but the same learned judge held in *Re* Cobb (1 N. B. R., 414), that mere articles of luxury and ornament, such as watches, pianos, and the like, should not be allowed. In *Re* Graham (2 Biss., 449) Hopkins, J., refused to allow watches. Some other cases, cited in the District Courts, where the identical question has been considered, have not been accessible for examination; but I presume, as in these cases, they all turn on the question whether or not the particular watch, under the circumstances, was an article of necessity only, or an article of luxurious ornament, in which too much money had been in-

vested to allow it in justice to the creditors. It will be found in all the cases where the law does not exempt *the article itself*, when value is immaterial, that this question of the reasonable or unreasonable value of it controls the case. The question is to be determined not solely by an appraisement of the particular article, but also by the attendant circumstances, or, as this statute puts it, "having reference in the amount to the family, condition, and circumstances of the bankrupt." The assignee is to determine the question, not by mere arbitrary choice on his part, but by the exercise of a sound legal discretion, subject to the final decision of the court, in the exercise of its supervising power. (*In re* Feely, 3 N. B. R., 66; *In re* Thiell, 4 Biss., 241.)

The phrase "other articles and necessaries" is a comprehensive but indefinite expression, and I have been at pains to discover the principle that is to direct the assignee and the court in the exercise of the discretion. This act is framed like other exemption acts, and, doubtless, with full knowledge of the adjudications of the State courts under similar statutes. In *Leavitt* v. *Metcalf* (2 Vt., 342) the statute exempted "such suitable apparel, bedding, etc., and articles of household furniture as may be necessary for upholding life." It was held that "one brass time-piece" was included, and the court say there were two former decisions exempting the "debtors' only time-pieces," but they are not cited. "It must be admitted," says the court, "that there is a great convenience in a family having some means of keeping time, even in health, but more especially in sickness. We do not pretend that a time-piece is absolutely necessary for subsistence, and also many other articles that have always been considered exempt under this statute. The word 'necessary,' or 'necessaries' has ever been considered, in legal language, to extend to things of *convenience and comfort*, and to things suitable to the situation of the person in society, and is not confined to things absolutely necessary for mere subsistence. An instructive case is that of *Hitchcock* v. *Holmes* (43 Conn., 528), where it is said we may "pass beyond what is strictly indispensable, and include articles which, to the com-

mon understanding, suggest ideas of comfort and convenience. But having done this, the obligation is upon us to exclude all superfluities and articles of luxury and ornament. Certain expensive furniture, including a costly clock, were, therefore, excluded; but a dissenting judge thought the clock should have been allowed. A piano was thought to be a luxury, because 'it is not an article of mere comfort, and does not minister to a want universally felt.' (*Dunlap* v. *Edgerton*, 30 Vt., 224.) In *Garrett* v. *Patchin* (29 Vt., 248) it was said the term necessaries means that which is convenient or useful—which a man procures for his own personal use, unless extravagant." And see *Montague* v. *Richardson* (24 Conn., 338, which cites *McCullough* v. *Maryland*, 4 Wheat., 316); *Davlin* v. *Stone* (4 Cush., 359), which says "the articles may be of that plain and cheap character which, while not indispensable, are to be regarded amongst the necessaries of life, as contradistinguished from luxuries." (See also, *Wilson* v. *Ellis*, 1 Denio, 462, and *In re* Thornton, 2 N. B. R., 189.) Guided by these humane and liberal principles of construction, I should say that to a commercial man a plain, and not extravagantly costly watch, such as this bankrupt owns, is, in the quaint language of the Vermont statute, "necessary for upholding life." The watch of John Steele should be allowed. As to the other I cannot determine, its value not being stated. If the parties cannot agree, they may have leave to make further application in the matter.

## UNITED STATES SUPREME COURT.

### OCTOBER TERM, 1878.

**One S. made a general assignment for the benefit of creditors and the assignee took possession the same day. The assignment was made in good faith, and not with any intent to hinder, delay, or defraud his creditors. There was no State statute in relation to such assignments in force at that time. On the following day appellant obtained a judgment against S., upon which an execution was issued and levied upon the goods of which the**

assignee had taken possession. Subsequently, upon petition of another creditor, S. was adjudicated a bankrupt; the acts of bankruptcy alleged in the petition being the suspension of payment of his commercial paper and the making of the aforesaid assignment. The assignee in bankruptcy afterwards, by virtue of a written agreement between himself and the appellant, took possession of the property levied on, but without prejudice to appellant's rights under the levy. *Held*, That the assignment was good at common law; that appellant acquired no priority of right by the execution levy; and that she could not by force of the adjudication secure a priority which, without it, she could not have.

## *SARAH W. REED, Impleaded, &c.*, v. *CHAS. W. McINTYRE, Assignee, &c., of WM. H. SHUEY.*

Appeal from the Circuit Court of the United States for the District of Minnesota. The facts appear fully in the opinion.

HARLAN, J.—On the 13th of March, 1874, W. H. Shuey, a merchant at St. Paul, Minnesota, executed a deed of assignment conveying his entire property, including his stock in trade, to W. S. Combs in trust for the equal benefit of all his creditors. Upon the same day, immediately after the acknowledgment of the deed, Combs, the assignee, entered upon the discharge of his duties by taking possession of Shuey's stock. During the succeeding day, Mrs. Reed obtained a judgment in one of the State Courts of Minnesota against Barnard and Shuey for the sum of five thousand one hundred and twenty dollars and forty-five cents. Execution immediately issued, and was levied by the sheriff upon the same goods of which Combs, as assignee of Shuey, had taken possession. Upon the occasion of the levy, the officer was notified of the assignment to Combs, and his possession of the goods. Subsequently, on the 31st of March, 1874, Mrs. Sanderson, a creditor of Shuey, by petition filed in the proper court, prayed that he might be declared a bankrupt upon two grounds: 1st, that being a merchant and trader, he had, on 1st of January, 1874, fraudulently stopped and suspended payment of his commercial paper, to wit, the promissory note held by the petitioner, and had not resumed payment thereof; 2d, that, on 13th March, 1874, being then insolvent, he made the said assignment to Combs with

intent to hinder, delay, and defraud his creditors, which assignment was alleged to be an act of bankruptcy within the meaning of the Bankrupt Act. Before the return of the rule which issued upon this petition, Shuey, by written stipulation, filed in court, without admitting or denying the alleged grounds of bankruptcy, consented that an adjudication might be entered against him forthwith. An adjudication was at once made, the order reciting that, in consideration of Shuey's written consent, and of the proofs in the cause, it was found that the facts set forth in the petition were true, and it was therefore adjudged that Shuey was a bankrupt within the meaning of the Act of Congress. McIntyre, the appellee, was duly selected assignee in bankruptcy, and to him the usual conveyance by the register was made. Afterwards, to prevent a sacrifice of the goods at forced sale, and to save expense, a written agreement was made between appellant and McIntyre, whereby the latter took possession of all the property levied upon under appellant's execution, but without prejudice to such rights as appellant had acquired under and by virtue of the levy referred to, and without prejudice to her right to raise any question in a suit in equity, to be promptly instituted, which she might have raised had said property remained in the custody of the sheriff under the levy.

The present suit was commenced by bill in equity filed by the assignee in bankruptcy for the purpose of obtaining a judicial determination of the rights of the appellant in the property, or rather in the proceeds of the property levied on under the execution. The appellant claims that, to the extent of the judgment against Shuey, the rights acquired by her through the levy are superior to any rights of the assignee in bankruptcy. That view was controverted by the assignee, and his position was sustained by the decree appealed from.

It is stated in the printed argument of counsel for the appellee, and the statement is not controverted by opposing counsel, that at the date of the assignment to Combs there was no statute of Minnesota relating to assignments by debtors for the benefit of creditors.

In determining, therefore, the validity and effect of the assignment in question, we must look to the doctrines of the common law and to the provisions of the Bankrupt Act passed by Congress.

The assignment to Combs was, according to the evidence in *this* cause, made in good faith for the purpose of securing an equitable distribution of the debtor's property for the benefit of all of his creditors, including the appellant, and not with any intent to hinder, delay, or defraud them. The right of a debtor at common law to devote his whole estate to the satisfaction of the claims of creditors results, as Chief Justice Marshall declares, "from that absolute ownership which every man claims over that which is his own." (*Brashear* v. *West*, 7 Peters, 608, 91 U. S., 500.) Assignments of property for such purposes, not made with the intent to hinder, delay, or defraud creditors, were upheld at common law, even where certain creditors were preferred in the distribution of the debtor's effects. Nor, according to the doctrines of the common law, could the validity of the assignment to Combs be assailed, simply because its *effect* was to prevent appellant by judgment and execution from obtaining a priority and preference over other creditors. An assignment which had the effect to delay a creditor in the enforcement of his demand by the ordinary process of law was not, for that reason alone, fraudulent and void. If not made with the *intent* to hinder, delay, or defraud creditors, it was sustained at common law. Such an intent was often conclusively presumed, if the assignment contained provisions inconsistent with good faith or so unreasonable and unusual in their character as to justify the conclusion that it was, in the language of Lord Mansfield in *Cadogan* v. *Kennett* (Cowp., 432, 434), a mere "trick or contrivance to defeat creditors." But where its provisions were consistent with an honest purpose to deal fairly and justly with creditors—the deed reserving no control over or interest in the property for the benefit of the debtor or his family, and imposing no improper restrictions upon the speedy sale and distribution of the property in satisfaction of the debts—the consequent temporary

Glenny *v.* Langdon *et al.*

Circuit Courts have no jurisdiction, under Section 4979 U. S. R. S., of an action by a creditor against an assignee in bankruptcy, the bankrupt, and others to reach property fraudulently concealed or conveyed by the bankrupt.

A creditor cannot maintain an action in his own name to recover the property or rights of property of the bankrupt even where the assignee refuses to proceed after being requested so to do.

Assignees of a bankrupt are not, in certain cases, bound to take property of an onerous or unprofitable character, which would burden instead of benefiting the estate. Nor in such cases are creditors without a remedy, as they may, by petition, apply to the court to compel the assignee to carry out their wishes. 24

*In re* Francis Tomes *et al.*

On the first of October, 1877, T. & W., copartners under the firm name of T. & Co., being then insolvent, made an assignment for the benefit of their creditors, but the signature and assent of the assignee was never obtained. On October 10, 1877, a paper was executed by T. & W., dissolving the firm and providing that all the assets were to be transferred to T., who agreed to assume all the debts. No notice of the dissolution was given, and the business was continued as theretofore under the old firm name. On October 22, 1877, T. made an assignment for the benefit of creditors to the same assignee. T. & W. having been adjudged bankrupt on a petition filed January 3, 1878, the assignment was set aside as in fraud of the Bankrupt Law. The assets which came in the hands of the trustee in bankruptcy were wholly from property formerly of the firm. T.'s individual debts exceeded one hundred thousand dollars. On application by the trustee for instructions as to the distribution of the assets, *Held*, That the transaction between T. & W. was invalid as to the firm creditors, and that the assets in the hands of the trustee must be held to be firm assets, to be distributed accordingly. 36

*In re* Steele.

A plain and not extravagantly costly watch is properly allowed to a commercial man under Section 5045 R. S., as a necessary article. 41

Reed *v.* McIntyre, Assignee.

One S. made a general assignment for the benefit of creditors and the assignee took possession the same day. The assignment was made in good faith, and not with any intent to hinder, delay, or defraud his creditors. There was no State statute in relation to such assignments in force at that time. On the following day appellant obtained a judgment against S., upon which an execution was issued and levied upon the goods of which the assignee had taken possession. Subsequently, upon petition of another creditor, S. was adjudicated a bankrupt; the acts of bankruptcy alleged in the petition being the suspension of payment of his commercial paper and the making of the aforesaid assignment. The assignee in bankruptcy afterwards, by virtue of a written agreement between himself and the appellant, took possession of the property levied on, but without prejudice to appellant's rights under the levy. *Held*, That the assignment was good at common law; that appellant acquired no priority of right by the execution levy; and that she could not by force of the adjudication secure a priority which, without it, she could not have. 45

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THE

# National Bankruptcy Register

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# SYNOPSIS OF CASES, No. 2.

*In re* Baldwin.

After the holder of a certain note signed by the bankrupt had made proof in full against the estate, an indorser on the note, who had been secured by the bankrupt, paid the amount thereof to the holder and disposed of the security. *Held*, That he should give credit for the amount realized from his security, and take a dividend upon the excess only of the original debt as proved. 52

*In re* Stephen Sims.

When a bankrupt, within two months prior to the commencement of proceedings, had mortgaged his stock of goods,—it being understood before the mortgage was executed that the consideration he received from the mortgagee should be paid to and accepted by a creditor then pressing the payment of a debt past due, for the same sum at which he received it, the mortgagee and the creditor being present and active in the negotiation with the bankrupt, the *onus* of showing "good faith" and "actual value" within the meaning of Section 5128, will be upon the mortgagee, before he will be allowed to enforce his mortgage. 57

Davis *v.* Assignee of Stitzer.

The assignee, by order of the court, sold the bankrupt's real estate discharged of liens. A judgment in favor of one K. was a lien upon the property at the time the order was made, but its lien expired the day before the sale. *Held*, That it should be allowed its proper portion of the fund for distribution. 61

*In re* Charles V. L. Pitts.

A creditor of the bankrupt, prior to the commencement of the proceedings in bankruptcy, recovered judgment in an action for goods sold and delivered. An order of arrest was granted in such action on affidavits showing that the credit given was induced by false representations made by the bankrupt as to his credit and means. An appeal from this order was not finally determined until after the proceedings in bankruptcy had been commenced, when it was affirmed. *Held*, That such a debt, even after judgment, is not dischargeable in bankruptcy, and that, as there was a final judgment before the commencement of the proceedings in bankruptcy, a stay of proceedings which would prevent the issue of an execution against the person of the bankrupt was not authorized by Sec. 5106. 63

*In re* Thomas Manahan.

Prior to the commencement of the proceedings in bankruptcy, the bankrupt made a voluntary assignment for creditors to one R., who thereupon took possession, but failed to give the bond required by the statute. By virtue of a provisional warrant granted in the bankruptcy proceedings, the marshal took possession of the property which had been transferred to R. by the voluntary assignment. Upon proper proceedings subsequently had in the State court, R. was removed, and a new trustee appointed. On motion by the trustee to vacate the warrant, and for an order directing the marshal to deliver the property to him, *Held*, That the provisional warrant did not authorize the marshal to take possession of property the title to which had passed by the State assignment to the voluntary assignee; that pending the question of adjudication and the appoint-

interference with the prosecution by particular creditors of their claims by the ordinary legal remedies, was regarded at common law as a necessary and unavoidable incident in the discharge by a debtor of his duty to creditors. (91 U. S., 500.) Such interference was not regarded as hindrance and delay within the meaning of the statutes against fraudulent conveyances. This precise question arose in *Pickstock* v. *Lyster* (3 M. & S., 371). In that case, a debtor being sued, made an assignment by deed of all of his effects for the equal benefit of creditors. The jury having been instructed that they must find the deed void if made with the intent to defeat the plaintiff in his execution, returned a verdict in his favor. But the verdict was set aside upon the ground that the jury were misdirected. Lord Ellenborough held that the assignment was "to be referred to an act of duty rather than of fraud, when no purpose of fraud is proved. The act arises out of a discharge of the moral duties attached to his character of debtor to make the fund available for the whole body of creditors. . . . It is not the debtor who breaks in upon the rights of the parties by this assignment, but the creditor who breaks in upon them by proceedings in his suit. I see no fraud, the deed was for the fair purpose of equal distribution." In the same case, Bayley, J., said: "It seems to me that this conveyance, so far from being fraudulent, was the most honest act the party could do. He felt that he had not sufficient to satisfy all of his debts, and he proposed to distribute his property in liquidation of them; this was not acceded to, for the plaintiff endeavored by legal process to obtain his whole debt, the obtaining of which would have swept away the property from the rest of the creditors." To the like effect are the authorities generally, as will be seen from an examination of the adjudged cases cited by Mr. Burrill in his Treatise on Voluntary Assignments (3d ed., § 319 et seq.) and in 1 American Leading Cases (5th ed., 71 et seq.). Our conclusion, therefore, is that the assignment to Combs could not, upon common-law principles, be impeached simply because it had the effect to prevent appellant, by means of the execution levy, from securing priority over all other creditors.

But it is contended that her right of preference over other creditors in the distribution of the proceeds of the property levied upon can be sustained under the provisions of the Bankrupt Law, and the adjudication of bankruptcy against Shuey. The argument is, that that adjudication having been made upon the ground, in part, that the assignment to Combs was made with the intent, on the part of Shuey, to hinder, delay, and defraud his creditors, such assignment is to be regarded as fraudulent and void from the moment of its execution, and, therefore, as interposing no obstacle whatever in the way of the levy subsequently made in behalf of the appellant. This argument, although plausible and ingenious, is not, in our judgment, sound, or at all consistent with the objects intended to be accomplished by the Bankrupt Law. If there had been no bankrupt statute in force when Shuey's assignment was made, the appellant, as we have shown, would not have acquired priority over other creditors by the execution levy, for the obvious reason that the right of property, in the goods seized by the sheriff under that execution, had previously passed, by a valid and unimpeachable deed of assignment, to Combs, in trust for the benefit of all the creditors of Shuey, and were not, thereafter, subject to execution, levy, and seizure as the property of the debtor. We have often declared that the equal distribution of the property of the bankrupt, *pro rata*, was the main purpose which the Bankrupt Statute sought to accomplish. (*Buchanan* v. *Smith*, 7 N. B. R., 513, 16 Wall., 277.) It would, therefore, develop a serious defect in that statute if its provisions received such a construction as would enable appellant to defeat that purpose by obtaining an advantage over other creditors. We are of opinion that no such construction is demanded either by its letter or spirit. Since by the sheriff's levy appellant acquired no priority of right in or lien upon the goods, how could the subsequent proceedings in bankruptcy have the retroactive effect to give her a preference, as of the date of levy, when, as between her and the creditors of Shuey, she obtained no priority by virtue of that levy? The argument in support of the opposite view ignores the fact that neither

Combs nor the creditors who acquired an equitable interest in the property, under the assignment to him, were parties to the proceedings which resulted in the adjudication of bankruptcy against Shuey. Their rights, therefore, under his assignment, were not, and necessarily could not, be conclusively determined by those proceedings. Notwithstanding the adjudication, Combs, the assignee of Shuey, was at liberty to contest with the assignee in bankruptcy the question whether the assignment to Combs was a fraud on the Bankrupt Act, or was made with the intent to prevent the property from coming to the assignee in bankruptcy, or from being distributed under the Bankrupt Act, or was made with the intent to hinder, delay, or defraud creditors. That no such issue was made between the assignee in bankruptcy and Combs, representing the creditors of Shuey, is due, doubtless, to the fact that the administration of the debtor's effects in the Bankruptcy Court will accomplish the same end designed by the assignment to Combs, viz., the distribution of the property for the equal benefit of all the creditors. But the absence of such an issue, and the failure of Combs to assert his rights against appellee, cannot have the effect to increase appellant's rights to any extent whatever. She cannot complain that the creditors submit without contest to the distribution of the property through the assignee in bankruptcy rather than through Combs under the assignment to him. If she did not acquire any right by force of the levy, it is of no consequence to her, under the issues in this suit, that the assignee in bankruptcy rather than Combs has possession of the property in question. Appellant cannot use the adjudication in bankruptcy to give vitality to an execution levy, which, when made, was ineffectual for any purpose of priority, and then employ the levy, thus vitalized, to defeat the primary object of the adjudication, which was to distribute the bankrupt's effects for the equal benefit of all the creditors. Whatever may be the respective claims of the assignee in bankruptcy and Combs, it is sufficient for the disposition of this case, to say that the appellant acquired no priority of right by the execution levy. The adjudication in the Bankruptcy Court was for the purpose

of bringing the bankrupt's effects into that court for distribution, and appellant cannot, by force of that adjudication, secure a priority which, without such adjudication, she would not have had. To hold otherwise would be to make the bankruptcy proceedings the instrument of defeating the wise and beneficent policy which the Bankrupt Act was intended to subserve. Even if it were conceded that the assignment to Combs was an act of bankruptcy, upon the ground that it was made with the intent to prevent the property from coming to the assignee in bankruptcy, and from being distributed under the Bankrupt Act, it was not invalid except with reference to proceedings under the Bankrupt Statute, to be instituted by the bankrupt, or by some creditor, for the purpose of bringing the bankrupt's effects into the Bankruptcy Court. (*Everett* v. *Stone*, 3 Story, 446; *Dodge* v. *Sheldon*, 6 Hill, 9; *Seaman* v. *Stoughton*, 3 Barb. Ch., 344; *In re* Biesenthal, 15 N. B. R., 228.)

Decree affirmed.

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UNITED STATES DISTRICT COURT—MASSACHUSETTS.

DECEMBER, 1878.

After the holder of a certain note signed by the bankrupt had made proof in full against the estate, an indorser on the note, who had been secured by the bankrupt, paid the amount thereof to the holder and disposed of the security. *Held*, That he should give credit for the amount realized from his security, and take a dividend upon the excess only of the original debt as proved.

## *In re BALDWIN.*

THE bank held a note for three thousand dollars, signed by bankrupt, and made proof in full against his estate. An indorser of the note, who held, as collateral security, stocks pledged to him by the bankrupt, afterward paid the debt at the bank and sold the stocks for one thousand and forty-five dollars.

The register certified the question to the court, and no one appeared to argue it.

LOWELL, J.—The equity announced in *Maure* v. *Harrison* (1 Eq. Cas. Abr., 93), that a creditor is to have the benefit of the securities given by the debtor to a surety, was assumed to be sound by Sir William Grant in *Wright* v. *Morley* (11 Ves., 22), but was soon after overruled by Lord Eldon in *Ex parte* Waring, reported in three different books (19 Ves., 345; 2 Rose, 182; 2 Gl. & J., 406). Lord Eldon appears to have been afraid that the business of traders and bankers would be injuriously hampered if the relation of trustee and *cestui que trust* were established in such cases, so that, as he said, a banker could never deal with the securities, even with the consent of the pledgor, until he had consulted with all the holders of the notes or bills. He held, however, in that case, that where both principal and surety were bankrupt, the same equity could be worked out by a sort of accident, that is to say: the assignee of the surety would have no right to use the pledged property as his general assets, because they were his only for indemnity; and the assignee of the pledgor could not take them without furnishing indemnity, and, therefore, to prevent a dead-lock between the two, the property must be applied to relieve both estates by paying the bills or notes *pro tanto*; not, however, by virtue of any equity which the bill-holders had, but as the only means of settling the two estates. This is the explanation of that case given by another learned Lord Chancellor, and is undoubtedly the true one. (*City Bank* v. *Luckie*, L. R., 5 Ch., 776.) This doctrine has been somewhat grudgingly admitted by the courts in England, and has been strictly limited to cases in which both parties were technically bankrupt or insolvent; that is, where their estates were being settled by the courts or in some equivalent mode; though a careful examination of the cases will show that the merchants of England have been disposed to take a larger view, and to administer the equity whenever the principal debtor has become insolvent, which is the American rule. (See *Powles* v. *Hargreaves*, 3 DeG. M. & G., 420; *Ex parte* Carrick, 3 DeG. & J., 208; *Trimmingham* v. *Maud*, L. R., 7 Eq., 201; *Ex parte* Gomez, L. R., 10 Ch., 645; *Ex parte* Smart, L. R., 8 Ch., 220; *Ex parte* Prescott, 3 Dea. &

Ch., 218; *Ex parte* Hobhouse, 2 Dea., 291; *Inman* v. *Clark*, Johns., 769; *Vaughan* v. *Halliday*, L. R., 9 Ch., 561.)

In this class of cases it has been uniformly held that when the creditors of this class had this incidental equity, or rather, when such an equity was cast upon them, they could prove against either estate only the balance remaining after the security was realized and distributed. (*Powles* v. *Hargreaves*, 3 DeG. M. & G., 536; *Banner* v. *Johnson*, L. R., 5 H. of L., 157; *Coupland's Claim*, L. R., 5 Ch., 167; *Leech's Case*, L. R., 6 Ch., 388; *Ex parte* Brett, Id., 138; *Ex parte* Joint Stock Co., L. R., 19 Eq., 1, 10 Ch., 198).

This is an exception to the general rule that security need only be credited as against the estate which furnished it; but it appears to be sound. It would be inequitable to permit proof in full against the estate of the surety, when the very purpose of the pledge was to protect him to the extent of the value of the property.

In this country the doctrine of *Maure* v. *Harrison* (1 Eq. Cas. Abr., 93) has been adopted without the limitation annexed to it by Lord Eldon. It is held here that even a solvent surety is a trustee for the creditor when the principal is insolvent. (*Moses* v. *Murgatroyd*, 1 Johns. Ch., 119; *Russell* v. *Clark*, 7 Cranch, 97, per Marshall, C. J.; *Bank of Auburn* v. *Throop*, 18 Johns., 505; *Vail* v. *Foster*, 4 Comst., 312; *Pratt* v. *Adams*, 7 Paige, 615; *Tonilmin* v. *Hamilton*, 7 Ala., 362; *Paris* v. *Hulett*, 26 Vt., 308; *Eastman* v. *Foster*, 8 Met., 19; *Rice* v. *Dewey*, 13 Gray, 47; *In re* Jaycox, 8 N. B. R., 241; Story Eq., §§ 368, 499; 4 Kent's Com., 163; 1 Lead. Cas. Eq. (3 Am. ed.,) 163.)

The difficulty anticipated in *Ex parte* Waring has not been found to occur. No doubt the surety and principal together can deal with the security as they please, so long as both are solvent, and the creditors have not interfered. But after the insolvency of either the principal or the surety, the law of this country undoubtedly is, that the property is to be applied to the debt upon which the surety is bound. It has even been held that he may apply it after his own liability has been barred

by lapse of time, or in some other mode. (See *Phillips* v. *Thompson*, 2 Johns. Ch., 418; *Eastman* v. *Foster*, 8 Met., 19.) And a bankrupt surety, being a trustee, may recover the property in his own name. (*Kip* v. *Bank of N. Y.*, 10 Johns., 63.)

It would seem to follow, from the foregoing considerations, that a creditor, who has this clearly recognized equity, might be obliged, upon some proper terms as to the costs being paid by the assignees, to resort to the property to the extent of its value, before proving his debt against the estate of the principal debtor. So is the argument of the late Judge Hall, in his very able and elaborate opinion in *Ex parte* Jaycox (8 N. B. R., 241). The decision, however, did not touch this point. In that case Judge Comstock was an indorser upon the notes of the bankrupts for a large amount, and held a mortgage conditioned for the payment of the notes and for his indemnity. The holders of the notes proved in full, and refused to modify their proof, but, on the contrary, filed a stipulation that they made no claim to the security: "It being understood that this release and surrender are not in any manner to release or affect the right of the said George F. Comstock to enforce a certain mortgage, etc." Judge Hall held that the creditors had the right to prove in full, waiving their security. What the resulting equities would be, between the surety and them, or between the surety and the assignees, was not before him, but he intimated an opinion upon it. Afterwards, the indorser being sued at law, the Court of Appeals held that he had no defense arising from this state of things. They intimate that there was neither law nor equity to release him, in whole or in part; but that appears to be beyond the point in issue. (*Merchants' Bank* v. *Comstock*, 11 N. B. R., 235, 55 N. Y., 24.) That decision is sound, because the assignees of Jaycox and Green were not parties to the suit, and it did not appear that the indorser had been disturbed in his title to the security. If Judge Hall's opinion is right, the assignee might have filed his bill against the surety and the holders of the notes, to have it declared that they had waived their equitable right to security, and had thereby exonerated the surety *pro tanto*, and asking that the security might

be given up and the holders be restrained from prosecuting the surety, excepting for the excess, if any, of their debt above the amount of the security. I have not seen the report of such a suit in that or any other case. If such a bill will not lie, the surety may indirectly have, as in that case he appears to have had, the benefit of the full proof, and of the security besides.

It has several times been held that the creditor may prove his debt in full, notwithstanding security held by a surety. (*Meed* v. *Nelson*, 9 Gray, 55; *Provident Inst.* v. *Stetson*, 12 Gray, 27; *Ex parte* Braithwaite, 36 L. T., N. S., 520; S. C. on appeal, *Ex parte* Barnfather, Id., 841.) It must be remembered, however, that the courts of bankruptcy had limited powers, and peculiar modes of proceeding. In a case somewhat similar in its principles to this, both the judges said that, by admitting the debt to proof, they did not decide that the creditor could have a dividend on the whole amount. (*Ex parte* Barham, 1 DeG. M. & G., 179.) In another case they said, in both courts, that the right of the surety, if he should afterward come in, was not, by any means, to be considered as decided by the admission of the full amount of the creditor's debt. (*Ex parte* Braithwaite, 36 L. T., N. S., 520, 841.)

The cases most nearly resembling this, that I have found, are *Ex parte* Sherrington (1 DeG. M. & G., 195), and *Ex parte* Mann (L. R., 5 Ch. D., 367). In the former, the creditor had proved his debt in full, and the surety applied to sell his security, and the order was passed for a sale, and that the creditor might have the proceeds when he reduced his proof by an equivalent amount. In the latter, the surety's security was an assignment of certain debts due to the principal, who afterward became bankrupt; by consent of the surety, the assignee collected these debts; and the register then ordered that he should apply the proceeds to pay the bills, although they had been proved in full by the holder. This order was affirmed on appeal. The holder not being before the court, they made no order for the reduction of his proof. This case seems to recognize an equity according to the American rule; that is, when only the principal was bankrupt. *Ex parte* Sherrington

was not cited, and has never been overruled that I am aware of.

I think the law of England and of Massachusetts probably is, that when the court has jurisdiction of all the parties, so that complete justice can be done, the creditor must give credit for the security which the surety must apply toward his payment; but in the absence of the surety the creditor may, in the first instance, prove in full.

The intent of the statute in permitting a surety who has paid the debt after the bankruptcy to prove it, is simply to put him on the footing of a creditor, which, by the old law, he could not be, unless he had paid before the bankruptcy. Now, if the surety had paid before the proceedings were begun, it is plain that he would be a secured creditor, and must give credit for the value of his security. Then, in subrogation to the creditor's proof, the surety should stand exactly as if he himself had proved.

Whether we hold that the creditor has a distinct equity which chancery might require him to enforce; or that he may prove in full, leaving the assignee to establish and work out the resulting equities when the time comes for a dividend; or whether we simply say, the surety is now in court, and has the standing of a creditor who has been partly secured; the result is, that he should give credit for the amount realized from his security, and take a dividend upon the excess only of the original debt as proved, and it is so ordered.

## UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

JUNE 24, 1878.

**When a bankrupt, within two months prior to the commencement of proceedings, had mortgaged his stock of goods,—it being understood before the mortgage was executed that the consideration he received from the mortgagee should be paid to and accepted by a creditor then pressing the payment of a debt past due, for the same sum at which he received it, the mortgagee and the creditor being present and active in the negotiation**

with the bankrupt, the *onus* of showing "good faith" and "actual value" within the meaning of Section 5128, will be upon the mortgagee, before he will be allowed to enforce his mortgage.

## *In re STEPHEN SIMS.*

THIS cause came before the court upon the petition of the assignee for direction as to the distribution of the proceeds of the sale of certain property belonging to the estate and claimed to be covered by a chattel mortgage held by James Monaghan. It was referred to the register in charge to take proofs to be certified into court with his opinion thereon.

On the 24th day of June, 1876, Sims gave to Monaghan four notes of five hundred dollars each, payable at 6, 12, 18 and 24 months; to secure the payment of which Sims gave Monaghan two mortgages, one on four and four-tenths acres of land in New Boston, and the other on his entire stock of merchandise, fixtures, furniture, etc., then in the store occupied by him. The last mortgage gave the mortgagee the right to take all the mortgaged property into his possession at any time when he should deem himself insecure. The consideration of these four notes—to secure the payment of which the two mortgages were given—was four hundred shares of the stock of The New York Silver Co.

These notes and mortgages were executed at New Boston, the place where Sims was carrying on business as a country merchant. The circumstances under which they were executed were these: Mr. McCarthy, of the firm of McCarthy, Roney & Giles, accompanied by Monaghan, had come on the day of their execution to New Boston for the purpose of collecting or securing a claim of over two thousand dollars some time past due which the firm of McCarthy, Roney & Giles held against Sims. McCarthy states that he regarded the claim as a "dubious" one, and that he invited Monaghan to accompany him because he was conversant with legal forms. The negotiations which followed at New Boston were participated in by McCarthy, Sims and Monaghan; and it resulted in the transfer by Monaghan to Sims of four hundred shares of the stock of

The New York Silver Co., for which Sims gave his four notes of five hundred dollars, two thousand dollars, secured by the mortgages above mentioned, and the taking by Mr. McCarthy of the Silver stock in full payment of Sims' debt to McCarthy, Roney & Giles. The concurrence of all three—Sims, McCarthy, and Monaghan—was necessary to the completion of the transaction.

The mortgaged property remained in the possession of Sims until, in consequence of the bankruptcy proceedings which were commenced on the 11th of July following, they came into the hands of the assignee who was appointed on the 23rd of November following, and, as stated in the petition of the assignee which is the subject of this reference, was sold on the 13th, 14th and 15th days of March, 1877.

*H. E. Burt*, assignee, in person.
*John Atkinson*, for Monaghan.

OPINION OF REGISTER.

The question is—whether the mortgage to Monaghan was executed to secure the payment of a "loan of actual value made in good faith," or whether it was executed to secure the payment of an existing indebtedness owing by Sims to McCarthy, Roney & Giles, and in violation of the provisions of Sections 5128 and 5129—one or both—of the Revised Statutes?

That Sims was insolvent on the 26th of June, 1876, and that this insolvency was known to McCarthy is established by the testimony. If the mortgages which were given to Monaghan for nearly the full amount of the debt of Sims to McCarthy, Roney & Giles had been given directly to them, the transaction would have been so clearly in violation of the provisions of the Bankrupt Act, that it is not probable that any attempt would have been made to sustain it. It is the interpolation of a sale of silver stock for two thousand dollars for notes and mortgages having 6, 12, 18, and 24 months to run, Monaghan a third

party being the vendor of the stock and the mortgagee of the debtor's property, which is relied upon to take the transaction out of the provisions of the Bankrupt Act, and thus render valid in the hands of Monaghan that which would have been void in the hands of the creditors. But it seems to me that the negotiations conducted between these three parties were essentially one; that every fact which was known to McCarthy, and which, because known to him, would bring the transaction within the inhibition of the Bankrupt Act, was also known to Monaghan; that Monaghan was there in the service of McCarthy, employed by him with express reference to the exigencies of the occasion, where a creditor is seeking to collect or secure a debt due to him by an insolvent debtor; that nothing appeared at the time, or in the testimony taken on this reference, to establish the "good faith" required by Section 5128 of the transaction between Monaghan and Sims, essential to which, as it seems to me, was "actual value" in the subject of the traffic between them. The circumstances, indeed, did not require any consideration by Sims of the value of the silver stock; for the taking of it by McCarthy at one thousand dollars was a part of the negotiations by which Sims was to take it of Monaghan. In short, it seem clear to me that this transaction was such that Monaghan cannot claim rights under it severed from or apart from the consideration of the purposes and liabilities of McCarthy in it. I deem it sufficient to rest my opinion on the principle that the *onus* of showing within the meaning of Section 5128, "good faith" and of the "actual value" of that which passed first from Monaghan to Sims and from Sims to McCarthy is upon any party who seeks, upon such a transaction as this is shown to be, to take the bankrupt's property out of the fund for distribution to the general creditors; and that so far from such good faith being shown, all the testimony in the case tends in the opposite direction, and to show that it was a scheme devised by McCarthy and Monaghan on their way to, and while at New Boston, to obtain a lien upon all of Sims' property to secure the debt due to McCarthy, Roney & Giles, and at the same time evade the inhibition of the Bankrupt Act.

It is by no means necessary, in order to reach the conclusion that this transaction cannot be supported, to affirm that any such tripartite agreement, even when it is clear that each part depends upon the others, and that the payment of a past due debt by an insolvent is the result attained, that such transaction is a violation of the Bankrupt Act; but I think it may properly be held that the good faith of it must be affirmatively shown, and that essential to such a showing is satisfactory evidence of *value* in that which passes from the third party to the debtor, and from him to the creditor, and it entirely begs the question here raised to say that the creditor's receipt is evidence of such value.

I am therefore of opinion that no part of the money in the hands of the assignee, derived from the sale of the mortgaged property, should be paid to Monaghan.

HOVEY K. CLARKE,
*Register in Bankruptcy.*

June 10, 1878. The certificate was argued, and on the 24th of June the court, BROWN, J., directed an order to be entered approving the opinion of the register and confirming his report.

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UNITED STATES CIRCUIT COURT—W. D. PENNSYLVANIA.

FEBRUARY 21, 1879.

**The assignee, by order of the court, sold the bankrupt's real estate discharged of liens. A judgment in favor of one K. was a lien upon the property at the time the order was made, but its lien expired the day before the sale. *Held*, That it should be allowed its proper portion of the fund for distribution.**

## *JAMES H. DAVIS* v. *Assignee of H. M. STITZER.*

Bill of review.

The question in this case was as to the validity of a lien for five thousand dollars on bankrupt's real estate. The facts in the case are as follows:

**Davis v. Assignee of Stitzer.**

Henry M. Stitzer was adjudicated a bankrupt on the 6th of April, 1876. A few weeks previous to his adjudication an execution was issued on a certain judgment, entered of record October 31, 1871, in favor of William Kightlinger, to amount of five thousand dollars, and levy made. The property of Stitzer was advertised for sale April 7th, 1876, by the sheriff of Crawford County. Stitzer having been declared a bankrupt, an injunction was granted restraining the sheriff from selling the property. The assignee of the bankrupt then sold the property November 1, 1876, and in the distribution of the funds Kightlinger was not allowed to participate, on the ground that at the time (or day before) the sale of the property of bankrupt the lien had expired by limitation, and the property was sold divested of it, and steps should have been taken for revival of judgment before assignee's sale. The matter was argued before the District Court, and the decision rendered that the Kightlinger judgment could not participate in the distribution of the proceeds of the sale.

*Thos. M. McFarland*, for complainant.
*Geo. A. Davenport*, for respondent.

McKennan, J.—In this case the judgment, which was excluded from the distribution of the bankrupt's estate, was a lien upon the bankrupt's real estate at the date of the filing of the petition in bankruptcy. An order was made by the Court restraining the judgment creditor from proceeding in any manner upon his judgment, which is unrevoked. On the 5th of September, 1876, when the judgment was an unquestionable lien upon the bankrupt's real estate, the Court ordered the sale of this real estate by the assignee discharged of liens. This was in effect a conversion of the real estate into money, a substitution of the fund for the land, as the only security to which the lien creditors could look for the payment of their debts. And, under all these circumstances, I am of opinion that, in contemplation of law and to effectuate justice, the conversion of the land, and the substitution of the fund arising from its

sale, are to be taken as having been effected when this order was made, and that the rights of the claimants to the fund are to be determined with reference to the circumstances existing at the date of such order. At that time the judgment of Kightlinger was a lien upon the bankrupt's real estate and retained its priority upon the substituted security, and ought to have been allowed its proper portion of the fund for distribution.

The order of the District Court is, therefore, reversed, and the matter is remanded to that Court, with directions to make distribution of the proceeds of the sale of the bankrupt's real estate upon the basis of the rights of the lien creditors to participate therein as of the date of September 5, 1876, when the order of sale was made.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JANUARY 9, 1879.

A creditor of the bankrupt, prior to the commencement of the proceedings in bankruptcy, recovered judgment in an action for goods sold and delivered. An order of arrest was granted in such action on affidavits showing that the credit given was induced by false representations made by the bankrupt as to his credit and means. An appeal from this order was not finally determined until after the proceedings in bankruptcy had been commenced, when it was affirmed. *Held*, That such a debt, even after judgment, is not dischargeable in bankruptcy, and that, as there was a final judgment before the commencement of the proceedings in bankruptcy, a stay of proceedings which would prevent the issue of an execution against the person of the bankrupt was not authorized by Sec. 5106.

## *In re CHARLES V. L. PITTS.*

THE facts appear sufficiently in the opinion.

C. *Whitaker*, for bankrupt.
*Bernard & Fiero*, for judgment creditors.

CHOATE, J.—This is a motion to vacate a stay of proceedings, by the effect of which a creditor of the bankrupt, who recovered judgment prior to the commencement of the proceed-

ings in bankruptcy, is stayed from arresting the bankrupt. The judgment record shows that the judgment was recovered for goods sold and delivered. Before judgment an order of arrest was made on affidavits showing that the plaintiff was induced to give the bankrupt credit for the goods by false representations as to his credit and means. From this order an appeal was taken, which was not finally determined until after the commencement of the bankruptcy proceedings. The order was then affirmed, and is now in force, and, under the laws of New York, entitle the judgment creditor to an execution against the person. That the judgment was a provable debt, being recovered before the filing of the petition, admits of no doubt. It would be so if recovered for a mere tort.

That the claim on which it was founded would have been provable even though the plaintiff might have had his action, or might even have commenced an action sounding in tort for the deceit, has also been held in this circuit. (*In re* Schwartz, 15 N. B. R., 330.) But the bankrupt is liable to arrest, notwithstanding the pendency of the question of his discharge, if the claim is one from which his discharge will not release him. (Sec. 5107; *In re* Rosenberg, 2 N. B. R., 236–241.) And within the meaning of Sec. 5107 there is no distinction to be made, as to arrest, between mesne and final process. (*In re* Patterson, 1 N. B. R., 307; *In re* Wiggers, 2 Biss., 71.) If the claim is one "created by fraud," within the meaning of Sec. 5117, it is not discharged, and if the original cause of action or debt was one created by fraud, it is not so merged in the judgment that the judgment becomes dischargeable; but the court will look through the judgment record to ascertain the real nature of the debt. (*In re* Patterson, 1 N. B. R., 307; *Warner* v. *Cronkhite*, 13 N. B. R., 52; *In re* Whitehouse, 4 N. B. R., 63.) There are some cases which hold that to bring a debt within this section as created by fraud, the fraud must be the *sole foundation* of the claim, and that a debt is not *created* by fraud if it grows out of a contract into which the party was induced by fraud to enter; that such a claim cannot be said to be created by fraud, particularly after the claimant has elected

to sue in contract and has recovered judgment in such suit; that the fact that the complaint contained allegations of fraud not constituting part of the cause of action, or that by the State law in such an action an arrest on mesne process or execution is given does not affect the question. (*Palmer* v. *Preston*, 45 Vt., 154. See also *Warner* v. *Cronkhite*, 13 N. B. R., 52, and case cited. But see *Stewart* v. *Emerson*, 8 N. B. R., 462.) In the case of *In re* Robinson (2 N. B. R., 341), it was decided by Mr. Justice Nelson, upon review, that where a judgment was recovered before the bankruptcy in an action for goods sold and delivered, and the bankrupt was arrested on execution, there having been, as in this case, an order of arrest upon affidavit before judgment that the sale was induced by false representations, that the bankrupt was not entitled to be discharged from arrest. That case has settled the law for this court that such a debt, even after judgment, is not dischargeable in bankruptcy. The facts do not fully appear in the report of the case, but the papers on file show that this precise point was ruled after full argument. As there was a final judgment before the commencement of bankruptcy proceedings, Sec. 5106 seems not to authorize a stay which will prevent the issue of the proper process to secure to the creditor the benefit of the right to arrest the bankrupt given him by the State law, and preserved by Sec. 5107. (See *In re* Whitney, 18 N. B. R., 563.)

Stay vacated, so as to allow the issue of process on the judgment for the arrest of the bankrupt.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JULY 3, 1878.

**Prior to the commencement of the proceedings in bankruptcy, the bankrupt made a voluntary assignment for creditors to one R., who thereupon took possession, but failed to give the bond required by the statute. By virtue of a provisional warrant granted in the bankruptcy proceedings, the marshal took possession of the property which had been transferred to R. by**

**the voluntary assignment. Upon proper proceedings subsequently had in the State court, R. was removed, and a new trustee appointed. On motion by the trustee to vacate the warrant, and for an order directing the marshal to deliver the property to him, *Held*, That the provisional warrant did not authorize the marshal to take possession of property the title to which had passed by the State assignment to the voluntary assignee; that pending the question of adjudication and the appointment of an assignee, the court should not allow its process to interfere with the possession by the State assignee of the property; but since the trustee appeals to the Bankrupt Court for aid, reasonable conditions on granting the relief may be imposed, such as that he shall release the marshal from all damages for taking and keeping the property, pay his fees, and receive said property subject to the condition that he shall not dispose of any part thereof until a reasonable time after the appointment of an assignee, or the termination of the proceedings, except with the approval of the Bankrupt Court.**

## *In re THOMAS MANAHAN.*

THE facts appear fully in the case.

*G. W. Lockwood*, for motion.
*P. W. Ostrander*, contra.

CHOATE, J.—On April 17, 1878, these proceedings were commenced by creditor's petition, and on the 2d of May, on proof by affidavit that the debtor was endeavoring to conceal his property, a provisional warrant issued.

March 14, 1878, the debtor made a voluntary assignment under the State law for the benefit of his creditors to one Robertson, who failed to give the bonds required by the statute of New York.

On the 20th of June, upon proper proceedings in the State court, Robertson was removed, and a new trustee was appointed in his place.

The trustee moves this court to vacate the provisional warrant, and for an order directing the marshal to deliver to him all the property transferred under the voluntary assignment, which it is alleged the marshal has taken possession of under the provisional warrant.

There has been no adjudication, the allegations of the petitioning creditors having been put in issue, and the matter is now on trial upon a reference to the clerk.

The provisional warrant did not authorize the marshal to take possession of property the title to which passed by the State assignment to the voluntary assignee. Although the petitioning creditors insist that the voluntary assignment gave the assignee no right to hold the property because of the failure to give bond, yet it now appears by their own affidavit that prior to the commencement of these proceedings the State assignee had actually taken possession of the property.

The proper course to dispute his title, or that of the trustee appointed in his place, is by a suit in equity to set aside the assignment.

Pending the question of the adjudication and the appointment of an assignee in bankruptcy, who may bring such suit, this court should not allow its process to interfere with the possession by the State assignee of the property, which at least is in his possession under claim of title.

But since the trustee appeals to this court for aid, reasonable conditions may be imposed on granting the relief prayed for.

The marshal appears to have acted in good faith. He should not therefore be subjected to damages for taking and keeping the property. And until an assignee is able to bring suit to recover the property, no disposition should be made thereof which will prevent its ultimate distribution under the Bankrupt Law, subject, of course, to the lawful charges of the State assignee if the State assignment shall be set aside.

Let an order be entered directing the marshal to deliver the property to the trustee upon payment of his proper fees, provided the said trustee shall release the marshal for all damages for taking and keeping the property, and shall receive the said property subject to the condition that no disposition thereof or of any part thereof shall be made until five days after the appointment of an assignee in bankruptcy, or the termination of these proceedings, except with the approval of this court, and in that case let the warrant be vacated.

Otherwise, motion denied.

UNITED STATES DISTRICT COURT—VERMONT.

FEBRUARY, 8, 1879.

The bankrupt's estate consisted in part of a farm on which he resided, which was subject to a mortgage. Under the laws of the State he was entitled to a homestead exemption to the value of five hundred dollars. The farm having been sold free of such homestead right, *Held*, That the bankrupt was entitled to a homestead of the full value of five hundred dollars in the equity of redemption, and that such sum should be paid to him out of the avails of the sale.

## *In re FREEDOM D. BEEDE.*

THE facts appear fully in the opinion.

WHEELER, J.—Part of the estate of the bankrupt consisted of a farm on which he resided, worth four thousand five hundred dollars, subject to a mortgage of one thousand eight hundred dollars, out of which his homestead right, if he has any, and whatever it is, cannot be taken without detriment to the residue.

The Bankrupt Law excepts out of the conveyance to the assignee, and leaves owned by the bankrupt, among other things, such property as is exempted from attachment and levy of execution by the laws of the State where the bankrupt resides to the amount so allowed by the laws existing in the year 1871. The laws of Vermont now, and in 1871 did, exempt the homestead of every housekeeper or head of a family, consisting of a dwelling-house, out-buildings, and the land used in connection therewith, to the value of five hundred dollars, from such attachment and levy. The assignee has asked, and, with the consent of the bankrupt, had granted to him, leave to sell the farm free of the homestead right of the bankrupt and leaving the avails of the farm after the sale subject to it. There is no question but that the bankrupt is a housekeeper or head of a family, nor but that the premises consisted of a dwelling-house, etc., so occupied as to come within the exemption. The only question is as to how the homestead right is affected by

the mortgage. The laws of the State govern this question, and in such cases where there is any question as to the construction of those laws, the construction given to them by the highest tribunals of the State is to govern. Their construction is as binding upon this court as the laws themselves are, and when such construction has been given, the sole province of this court, in that respect, is to ascertain what it is and apply it. The construction given by the Supreme Court of the State to this homestead law has always and clearly been such as would give this bankrupt a homestead right in this farm to some extent. (*McClary* v. *Bixby*, 36 Vt., 254; *Morgan* v. *Stearns*, 41 Vt., 398; *Lamb* v. *Mason*, 50 Vt., 345.)

The only question is whether he is entitled to a homestead of the full value of five hundred dollars in the equity of redemption, or only to a homestead to the actual value of five hundred dollars in the buildings and land, subject to its proportionate share of the mortgage. If he is entitled to the former, he is entitled to five hundred dollars of the avails of the sale; if only to the latter, he is only entitled to five hundred dollars after it has borne its share of the mortgage, which is $\frac{1}{7}\frac{1}{7}$ of the value of the whole farm, and would absorb $\frac{1}{7}\frac{1}{7}$ of the homestead or of the five hundred dollars, its equivalent, and leave $\frac{2}{7}\frac{2}{7}$, or three hundred dollars. In *McClary* v. *Bixby* the Supreme Court of the State declared and held that the homestead right was a right to be set out of the *estate* of the head of a family, and was to be treated as an exemption of so much of his *estate*. That decision was steadily followed until that of *Lamb* v. *Mason*. It has been claimed that it was not followed there. The law has not changed since 1871, if the decisions have, but has always been the same, and the latest construction must be taken here on this question to be the true one; so, if there is a change in the decisions, it must be followed. But the court there do not profess to make any change, and it is not to be presumed that they did unless it clearly appears that they did. The *estate* of the bankrupt in this farm was his equity of redemption. According to *McClary* v. *Bixby* and the cases which followed it, he was entitled to an exemption of five hun-

dred dollars in value of that. In *Lamb* v. *Mason* the homestead had been set out in levying an execution upon the property including it, subject to a mortgage. The question was whether the part set out for a homestead should bear its proportion of the mortgage. The statute provided that, in making levies upon homesteads encumbered by mortgages, they should proceed the same as in the case of mortgages upon distinct parcels of land. It does not appear from the report of the case how that requirement was carried out, and the statute in providing for levies on land makes no express provision for such a case. If the appraisers considered that after the homestead should be set out it would be a distinct parcel of the land, subject to its share of the mortgage, then, to give the debtor five hundred dollars in value of equity of redemption, they would appraise so much as would be worth five hundred dollars after it had sustained its share of the mortgage. That would seem to be a correct mode of procedure if one of two parcels, both subject to a mortgage, was to be set off. In the absence of any proof of how the levy was made, it may have been assumed that this was the way in which it was made. But, however that may have been, there is no question here as to how whatever homestead right this bankrupt had could be set out to him in levying an execution, nor of presumption as to how it may have been set out, as it has never been set out. The only question is as to the extent of his right, in whatever mode it might be maintained, presuming that in some way, whatever his right is, it could be maintained. The decisions were so many in number and so uniform that, in cases where there was no question as to priority of debts, as there is none here, the homestead man was entitled to five hundred dollars in value of his estate or interest in the premises, that it is not to be presumed the court intended to vary their ruling when they did not say that they did, and it does not appear that they must have intended to do so. The result is that the bankrupt was entitled to five hundred dollars in value of his equity of redemption, and is entitled to five hundred dollars in money out of the avails of it.

Let an order issue to the assignee for the payment of five hundred dollars of the avails of the equity of redemption to the bankrupt for and on account of his homestead right.

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## COURT OF CHANCERY—NEW JERSEY.

OCTOBER TERM, 1878.

An assignee in bankruptcy can maintain an action in the State courts to set aside conveyances of property made by a bankrupt in fraud of his creditors.

In a bill filed by an assignee in bankruptcy to set aside conveyances made by the bankrupt in fraud of creditors, it is sufficient to allege that the deeds were without consideration, and were designed merely to defraud creditors; a general charge or statement of the matter of fact is sufficient, and it is not necessary to charge the circumstances which may conduce to prove the general charge.

### *F. A. JOHNSON, assignee, etc., of CHRISTIAN SAUERWEIN* v. *ADAM HELMSTAEDTER et al.*

BILL for relief. On general demurrer. The facts appear in the opinion.

*S. Kalisch*, for the demurrants.
*F. A. Johnson, in pro. per.*

THE CHANCELLOR.—The bill is filed by the assignee in bankruptcy of Christian Sauerwein against Adam Helmstaedter and Sauerwein's wife. It states that Christian Sauerwein and William Sauerwein were duly adjudicated bankrupts by the United States District Court for the District of New Jersey, on petition of their creditors, on the thirteenth of January, 1877; that on the twentieth of February following the complainant was duly appointed their assignee in bankruptcy, and that an assignment of all their property was then made to him. It further states that Christian Sauerwein and Eva his wife, on the eighth of July, 1876, by deed of that date conveyed to Helmstaedter a lot of land therein described, situated in Newark. It charges that that conveyance was made without con-

sideration in law or in fact, and for the purpose of placing that land out of the reach of Christian Sauerwein's creditors. It further states that Helmstaedter, on the eighth of November, 1876, conveyed the property to the defendant, Eva Sauerwein, and it charges the truth to be that that conveyance was also without consideration in law or in fact, and was made for the purpose of transferring the title to the property to Sauerwein's wife, for the purpose of defrauding the creditors of the bankrupt, and that the property ought to be decreed by this court to be the property and estate of Christian Sauerwein or of the complainant as his assignee, and that the title ought to vest in the complainant as such assignee for the benefit of the creditors of the bankrupts. The defendants demur to the bill for want of equity. There are facts stated and averments made sufficient, if established by proof, to warrant a decree in favor of the complainant. It is alleged, in the stating part of the bill, that the conveyances which it seeks to set aside as fraudulent were without consideration, and were made for the purpose of transferring the title of the property to Eva Sauerwein to defraud the creditors of the bankrupts. Though the word "charge" is used, yet it is evident that the pleader intended to allege or aver the fact. No objection was made on the argument to the form of the averment, but it was urged that it is not sufficient, because no facts are stated. It is enough to allege that the deeds were without consideration, and were designed merely to defraud creditors, and the defendants will be bound to answer the averment. A general charge or statement of the matter of fact is sufficient, and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge, for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proof. (Story's Eq. Pl., 328; *Nesmith* v. *Calvert*, 1 Woodb. & Min., 34; *Rogers* v. *Ward*, 8 Allen, 387; *Houghton* v. *Reynolds*, 7 Jur., 414.)

The defendant insists that the complainant cannot, merely as assignee in bankruptcy, maintain an action to set aside conveyances of property made by the bankrupt in fraud of his

creditors. But the position cannot be maintained. An assignee in bankruptcy is expressly vested with the title of the bankrupt in all the property conveyed away by the latter in fraud of his creditors. (Bankrupt Law, Section 14.) And as representing creditors he may sue for such property in equity. (*Carr* v. *Hilton*, 1 Curt., 230; Bump on Fraud. Conv., 519, 520; *Bradshaw* v. *Klein*, 1 N. B. R., 542, 7 Am. Law Reg., N. S., 505; *Ward* v. *Van Bokkelen*, 2 Paige, 289.) And such suit may be maintained in the State courts. (*Cook* v. *Whipple*, 9 N. B. R., 155, 55 N. Y., 150; *Ward* v. *Jenkins*, 10 Metc., 583; *Mays* v. *Manf. Nat. Bk.*, 4 N. B. R., 446, 660, 64 Pa. St., 74.)

The demurrer will be overruled with costs.

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## UNITED STATES CIRCUIT COURT—LOUISIANA.

FEBRUARY 3, 1879.

The failure of the bankrupt to perform a composition according to its terms does not clothe a creditor with the right to disregard the bankruptcy proceedings and sue for his whole debt.

After the filing of the voluntary petition in this case, a creditor commenced suit and prosecuted the same to final judgment. A composition having in the meantime been proposed, accepted, and confirmed, an injunction was granted staying the collection of the judgment. The creditor's debt was included in the debtors' statement, but was never proved. The debtors having failed to pay the first instalment of the composition to this creditor, and having failed to pay the second instalment when the same fell due, the creditor applied for a dissolution of the injunction, and the court ordered that the same be dissolved unless the debtors should forthwith carry out the composition or proceed with the bankruptcy proceedings within thirty days. On petition to review said order, *Held*, That the injunction was properly granted, and that the court was right in refusing to dissolve it.

### *In re BAYLY & POND.*

Petition of review of Paul Fourchey.—The case was this: On March 2, 1876, Bayly & Pond, a commercial firm in the city of New Orleans, filed in the District Court their voluntary petition in bankruptcy, in which they proposed and prayed for

a composition with their creditors. Notwithstanding the filing of said petition, the petitioner in review, Paul Fourchey, on March 13, 1876, instituted a suit, in the Fourth District Court of the Parish of Orleans, against said firm of Bayly & Pond, to recover the sum of one thousand two hundred and thirty-seven dollars due to him on the promissory note of said firm.

Bayly & Pond, on March 27, 1876, pleaded to said action the certificate of protection of said United States District Court, and on April 10, 1876, they filed an amended answer, in which they set out that the creditors had held, in the bankruptcy proceedings, a meeting and accepted a composition proposed by them, to wit: The payment of twenty-five cents on the dollar, one-half on the confirmation by the court of the composition proceedings, and the other half in sixty days thereafter.

Notwithstanding their defences, the State court rendered judgment in favor of Fourchey againt Bayly & Pond for one thousand two hundred and thirty-seven dollars, and interest, and the judgment was signed April 15, 1876.

The debt due to Fourchey, on which the judgment was based, was never proved against Bayly & Pond in the bankruptcy proceedings.

On April 12, 1876, the U. S. District Court, on the application of Bayly & Pond, issued an injunction restraining Fourchey from enforcing the collection of his judgment by execution.

Bayly & Pond failed to pay Fourchey the first instalment of the composition, and also failed to pay Fourchey and other creditors the second instalment when the same fell due.

On January 4, 1877, Bayly & Pond being still in default in the payment of their composition, Fourchey filed a motion for the dissolution of the injunction above mentioned. On this motion the District Court made an order in these words: "Ordered, that unless the bankrupts forthwith carry out the composition, or within thirty days proceed with their bankrupt proceedings, the injunction herein granted be dissolved."

The petitioner thereupon filed this petition of review, in

which he asked a reversal of said order and a dissolution of said injunction, because, as he claimed,

1. He is entitled to enforce his judgment for the full amount recovered, the said Bayly & Pond having never been adjudicated bankrupts, and having failed to carry into effect the said composition; and, because,

2. The right of the creditor to enforce his claim is an absolute right when the debtor does not seek to set aside the composition or offer excuse for failure to execute the composition, and when the creditors do not seek to set aside the composition or to enforce it.

*T. J. Semmes*, for petitioner.
*J. H. Kennard*, contra.

Woods, J.—It is clear that Fourchey was in the first instance properly enjoined from proceeding to enforce the collection of his judgment out of the property of the bankrupts.

Bayly & Pond filed their petition in bankruptcy March 2, 1876, in which they prayed for the benefit of the act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867. The suit of Fourchey was not begun until March 13, and judgment was not rendered in his favor until April 10. The property of the bankrupts was by the force of the Bankrupt Act protected from any interference by their judgment or execution issued thereon. (See Section 5,106, Revised Statutes.)

The only question, therefore, for solution is: What is the effect of the composition proceedings, and the failure of the bankrupts to pay the composition, on the rights of the petitioner?

Clearly as long as the bankrupts were paying the instalments according to the terms of their composition, the judgment creditor could not enforce the collection of his debt against the property of the bankrupt, for the act of Congress providing for composition declares that the provisions of a composition accepted by a resolution adopted at a meeting of the creditors

"shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed." (18 Stat., 183.) And Fourchey's name, address, and the amount of the debts due him from the bankrupts were shown in the list above mentioned.

Has the failure of Bayly & Pond to perform the composition according to its terms clothed Fourchey with the right to disregard the bankruptcy proceedings and sue for his whole debt?

It seems to me that such a result does not follow the failure of the bankrupts to pay their composition.

The bankruptcy proceedings are not determined and closed by the order of the Court approving the resolution of the creditors accepting the composition. The case is still pending. Further steps in the case may be necessary. The law says: "The provisions of any composition made in pursuance of this section may be enforced by the court on motion made in a summary manner by any person interested and on reasonable notice, and any disobedience of the order of the court made on such motion shall be deemed a contempt of court."

"If it should at any time appear to the court on notice, satisfactory evidence and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept or confirm such composition, or may set the same aside, and in either case the debtor shall be proceeded with as a bankrupt, in conformity with the provisions of law, and proceedings may be had accordingly, and the time during which such composition shall have been in force shall not in such case be computed in calculating periods of time prescribed by said act." (18 Stat, 184).

It is clear from these provisions of the statute that when a composition is set aside by the court the proceedings in bankruptcy may be prosecuted without beginning *de novo*. No new petition is required. The case is taken up just where it was

when interrupted by the composition. The bankruptcy suit is therefore pending all the time, and by its force protects the property of the debtor from seizure by any creditor who is bound by the composite resolution.

If a composition fails and the court orders the case in bankruptcy to proceed, the court has it in its power to see that those creditors who have not received their pro rata shares, if any, shall be made equal to those who have in the distribution of the assets of the bankrupt estate.

To hold that a failure to pay according to the composition resolution authorizes the creditors who are not paid to seize the property of the bankrupt, would be to render vain and futile the bankruptcy.

The petitioner in review has attempted to sustain his views by the citation of cases under the English composition act. (*Edwards* v. *Combe*, L. R., 7 C. P., 519; *Newell* v. *Van Praagh*, L. R., 9 C. P., 96; *In re* Hatton, L. R., 7 Ch. App., 723.)

It is to be observed that these cases arose under Sections 126, 32 and 33 Vic. (see Blumenstiel's Law and Practice of Bankruptcy, page 405), which provides that "the creditors of a debtor unable to pay his debts may, without any proceedings in bankruptcy, by an extraordinary resolution resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor. If it appears to the court in satisfactory evidence that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice, or undue delay to the creditors or to the debtor, the court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

The difference between the English act and ours is evident at a glance. Under the English act the composition may take place without any proceedings in bankruptcy, and if the composition fails, the court may, but is not required to adjudge the debtor a bankrupt.

Under the act of Congress there can be no composition unless a petition under the Bankrupt Act is first filed; and if the proceedings in bankruptcy are arrested by a composition, and

the composition fails, the law declares that the bankruptcy shall proceed.

I therefore think that the authorities cited are not pertinent to the American statute.

These remarks also apply to the cases relied on by petitioner, cited from Massachusetts Reports. (*Wollaston Bank* v. *Porter*, 17 N. B. R., 329, 122 Mass., 308; *Pierce* v. *Gilkey*, 124 Mass., 300.)

On the other hand, in a well-considered case, the Court of Appeals of Maryland has decided, basing its decision on the peculiar form of our statute, that where a resolution of composition provides that the instalments shall be secured by the notes of the debtor, a creditor who has proved his debt cannot sue for his original debt in a State court, although the debtor has made default in payment of one of the instalments. (*Deford* v. *Hewlett*, 18 N. B. R., 518.)

The remedy for failure to comply with the terms of the composition, it seems to me, is clearly pointed out by our statute. It does not permit the creditor to sue for and recover his original debt, but provides for an application to the court for the enforcement of the composition, or, in case the composition cannot be enforced, that the proceedings in bankruptcy shall be resumed.

It results from these views that Fourchey was properly enjoined by the District Court, and that the court was right in refusing to dissolve the injunction.

Petition of review dismissed at petitioner's costs.

## UNITED STATES DISTRICT COURT—MASSACHUSETTS.

JANUARY 3, 1879.

The creditor bank held a mortgage for eight thousand dollars given by the bankrupt and one S. M. upon land owned by them in equal shares. After the bankrupt had been adjudicated and an assignee appointed, the bank, without notice to the assignee or leave of court, sold the mortgaged premises at auction for one thousand dollars and claimed to prove for

**the balance of the debt. It was afterwards agreed by the parties that the value of the land was six thousand dollars, and that the sale had been made "without any thought of the effect it might have upon the balance of their claim in bankruptcy." *Held*, That no sufficient equitable excuse was given for the failure to comply with the law in disposing of the security, and that the creditor could not prove for any sum whatever.**

## *In re FRANCIS MILLER. Ex parte MONSON SAVINGS BANK.*

The Monson Savings Bank held a mortgage, given by Francis Miller, the bankrupt, and S. H. Miller, of land in Springfield, owned by them in equal shares, to secure their joint note for eight thousand dollars and interest. After F. Miller had been adjudged bankrupt, and after the appointment of his assignee, the bank sold the land by auction, in pursuance of a power in the deed, without notice to the assignee, or actual knowledge on his part, or leave of court, and it was bought by one Holmes, who was the highest bidder, for one thousand dollars. Giving credit for this amount against the debt and interest and certain taxes and other charges, there remained an excess of debt amounting to seven thousand seven hundred and eighty-one dollars and twenty-six cents, for which the bank offered proof. After the court had intimated that proof could not be allowed on that state of facts, the parties further agreed that the value of the land was six thousand dollars, and that the sale was made by the bank "without any thought of the effect it might have upon the balance of their claim in bankruptcy."

The question was then argued, whether the bank could prove for any sum, and what?

*M. P. Knowlton*, for the Savings Bank.
*G. Wells*, for the assignee.

Lowell, J.—The practice of Courts of Bankruptcy, adopted in its substantial features by our statute (Section 5075), requires a secured creditor, if he intends to prove for any excess of his debt above the value of the security, to have that

value ascertained either by agreement with the assignees or under the direction of the court. In England the creditor may, in order to prove at the first meeting, put his own value on the security, but at the risk of accounting for all that he obtains above that value, with no corresponding right to have credit for any deficiency; which leads, I suppose, to a settlement with the assignees in the first instance, in all doubtful cases.

The reason of the rule is well shown by this case. It is, that the assignee may take care that the property brings its full value. Here the sale produced exactly one-sixth of the admitted value; and it will not readily be believed that this result was not purposely brought about for the benefit of the mortgagees, and that they have not retained the actual control of the property, hoping for a large dividend besides.

The decisions follow the statute, and reject proof of any part of a debt when the creditor has failed to take the steps required by law. (*In re* Herrick, 17 N. B. R., 335; *McHenry* v. *La Société Française*, 16 N. B. R., 385.) Our statute is so explicit that decisions are not needed. In bankruptcy there is, in my opinion, some equitable latitude; and if a case should arise in which some forms had been neglected, through mistake of fact, and possibly under some circumstances under one of law, and complete justice could be done, I think the court might permit proof for the proper sum. (*Lee* v. *Franklin Savings Bank*, 3 N. B. R., 218.) But I do not look upon this as such a case. The parties have agreed that the bank had "no thought" of the effect of their action upon the proof; but this is not enough. They may have known that their action was irregular, though they did not consider the consequences. If they had been ignorant of the bankruptcy, or of the appointment of an assignee, they might well ask to have their mistake corrected. The agreement finds no such state of facts. They acted in a way that was not only irregular, but unfair between man and man, in not giving the assignee notice of the sale.

That the bank was a secured creditor in the sense of the statute, was not denied. It held the joint note of two persons,

not alleged to be partners, and a mortgage upon land which the promissors held in common. There is no evidence that there was any relation of principal and surety between the debtors. If the petitioners claim to prove in full against the estate of one of those persons, they must, of course, give credit for the whole amount of the security, and if they restrict their proof to one-half of the debt, they must account for half the security. (*Richardson* v. *Wyman*, 4 Gray, 553.) It may be doubtful whether, in England, there could be proof at all against the estate of one joint debtor, while the other remained solvent. The general theory of administration there has been that the solvent debtor is to pay, and then make such proof as the whole equities will give him.

I do not doubt, however, that the practice here has been to admit full proof against one joint debtor, if the debt was unsecured, or the security was properly dealt with.

This debt was secured, and no sufficient equitable excuse has been given for the failure of the creditor to comply with the law in disposing of the security.

Proof rejected.

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UNITED STATES DISTRICT COURT—NEW JERSEY.

OCTOBER TERM, 1878.

**One who, with notice of the fraud, purchases property fraudulently conveyed by a bankrupt, has no right, after being compelled to surrender it to the assignee, to reimbursement either for improvements upon the premises or for moneys advanced to reduce incumbrances.**

## *In re PETER MEAD.*

ON petition to expunge claim of Edmund Mead.

NIXON, J.—The assignee of Peter Mead, bankrupt, filed a bill in this court, some years ago, to set aside, as fraudulent and void against creditors, a conveyance of real estate made by

said Mead and wife to one Temperance Berry. The claimant in this case was one of the defendants in that suit, filing a separate answer and contesting the assignee's right to recover. The decree of the court was that the sale was fraudulent and void, and that the claimant, who was a purchaser of the premises of the bankrupt's grantee, had sufficient notice of the fraud to put him upon inquiry, and that although he may have paid full value, he took the property subject to the right of the creditors of Peter Mead to be paid their debts.

The testimony in these proceedings discloses the fact that when Peter Mead transferred the premises to Berry they were encumbered with two mortgages; one to a Mr. Bonnell, to secure the payment of five hundred dollars, and the other to a Mr. Whitty, for two thousand dollars, and that Berry paid off the latter in the month of October, 1868, while the property was held by his wife. He did not cancel the mortgage, however, but caused it to be assigned to one Alfred Berry, who says that he was ignorant of the transaction at the time and paid nothing on the mortgage.

There seems to be some confusion in the testimony whether the Bonnell mortgage was paid by Berry before the execution of the agreement to sell the property to the claimant on the 19th of May, 1869, or with the five hundred dollars that Edmund Mead advanced on the delivery of the said agreement. But it is a matter of small consequence whether the mortgagees were in fact paid by Edmund Mead or by Berry. In either case the person paying has no claim upon the estate of Peter Mead, as against his creditors, to have the amount refunded.

The court has already decided that the transfer to Berry was a fraud and that Edmund Mead had cause to know that the fraud was being perpetrated upon the creditors of Peter Mead.

Under these circumstances he purchased the property at his peril, and when, after a long litigation, he was compelled to surrender it to the assignee, there does not remain in him any claim either for improvements upon the premises or for reduction of incumbrances.

The case falls within the rulings of the Supreme Court in *The Railroad Company* v. *Soutter* (13 Wall., 517), and there must be an order entered expunging the claim.

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## COURT OF APPEALS—NEW YORK.

FEBRUARY 19, 1878.

**Evidence of declarations of a bankrupt made before the bankruptcy are admissible against his assignee to support a claim against the estate.**

**In a suit by an assignee in bankruptcy of a firm to foreclose a mortgage which had been given to the firm, the defendant may set off any demand in his favor against such firm which is the subject of set-off.**

**The statute of limitations does not run against claims of creditors of a bankrupt which were not barred at the time of adjudication.**

*WILLIAM VON SACHS, Assignee, &c., appellant,* v. *GEORGE C. KRETZ et al., respondents.*

THIS was an action brought by plaintiff as assignee to foreclose a mortgage given by the defendant Kretz to the firm of Schepcler & Co. The facts appear fully in the opinion.

*Samuel Hand*, for appellant.
*John H. Bergen*, for respondents.

ANDREWS, J.—The defendant, George C. Kretz, under his agreement with Schepeler & Co., was entitled to four per cent. of the net profits of the business of the firm for the year 1863, as a compensation for his services in that year, and the referee found that the net profits of the business in 1863 were between two hundred and fifty-six thousand and two hundred and fifty-seven thousand dollars, of which one hundred thousand dollars were not distributed, and that four thousand dollars with interest from January 1, 1864, was due to Kretz from Schepeler & Co., on account of his share in the undistributed profits.

We are concluded by the finding of the referee upon this question, if there was any evidence tending to sustain it. The

testimony of Kretz was taken upon commission. He testified that the net profits of Schepeler & Co., in 1863, were about two hundred and fifty-seven thousand dollars, and exceeded two hundred and fifty-six thousand dollars, and that one hundred thousand dollars of this amount was not divided, but was passed to a separate account, called "Reserved Capital Account," for future distribution among the parties interested. In answer to a cross interrogatory as to how he arrived at the net profits, he stated that at the end of 1863 the books were carefully balanced by himself, assisted by one of the firm and under his direction, and that the amount of the net profits as stated by him appeared from the balance then struck, and that in making it all the losses during the year were taken into account. The books of Schepeler & Co. were introduced by the defendant. On one page of the journal were entries crediting to the several members of the firm and to Kretz sums amounting in the aggregate to one hundred and fifty-six thousand six hundred and fifteen dollars and seventy-one cents, of which sum six thousand two hundred and sixty-four dollars and sixty-three cents was credited to Kretz, as follows: "George Kretz, capital account, four per cent. on one hundred and fifty-six thousand, six hundred and fifteen dollars and seventy-one cents, for 1863, six thousand two hundred and sixty-four dollars and sixty-three cents." Below these entries was an entry as follows: "Sundries to balance account, reserved account fund, 1863, one hundred thousand dollars." The plaintiffs, at a subsequent stage of the trial, read from the private journal, from what appeared to be a profit and loss account, this entry: "To reserved funds of 1863. Write off, for depreciation of currency, one hundred thousand dollars." It does not appear when this entry was made, but, from its connection with other entries, it is probable that it was made after October, 1864, at which time Kretz left the employment of Schepeler & Co., and there is no explanation of the meaning of the entry, or when the depreciation occurred to which it refers. If this sum represented losses occurring after January 1, 1864, not connected with the business of 1863, the case discloses no reason for charging any portion of the loss

against Kretz's share of the undistributed profits of 1863. It was, upon the whole evidence, a question of fact whether Schepeler & Co. were indebted to Kretz in the sum of four thousand dollars on account of the profits of 1863, and the finding of the referee upon the subject is conclusive.

The referee, against the objection of Kretz, and on the ground that he, by introducing the books, made them evidence generally as to his account, permitted the plaintiff to show entries appearing therein of charges against Kretz, between January 1, 1864, and January 1, 1865, two of them of a date subsequent to October, 1864. It is claimed by the plaintiff, and this claim appears to be well founded, that the account of 1864 appearing upon the books, shows a balance, against Kretz in favor of Schepeler & Co., of one thousand seven hundred and sixty-seven dollars and ninety-one cents, and this sum the plaintiff insists should have been allowed in reduction of the claim for the undistributed profits.

The referee expressly found that the plaintiff was not entitled to have this apparent indebtedness of Kretz applied on the four thousand dollars, and also that the whole sum of four thousand dollars was due and unpaid.

The point here is, was it an error in law for the referee to disallow the balance of one thousand seven hundred and sixty-seven dollars and ninety-one cents? He admitted the whole account to be shown, and it must be assumed that he considered the claim of the plaintiff to be allowed this credit, and rejected it.

The entries in the account of 1864 were not in the handwriting of Kretz, and although, up to the time he left the employment of Schepeler & Co., he had access to the books, it does not appear that the entries were seen by him. There is no proof, aside from the entries themselves, when they were made. They were entries in the interest of Schepeler & Co. The referee had the books before him. The appearance of the entries may have indicated that they were made at one time and after the transactions to which they relate. There is no affirmative evidence in the case that they were not made in the

usual course of business, but every intendment is in support of the judgment, and there is no finding inconsistent with the fact that the referee may have been satisfied from inspection of the books that the account was not entitled to credit. Sitting in review of the case, without the books before us, we cannot say that the account of 1864 was not subject to criticism and suspicion, and for that reason properly rejected. The offer to show by the witness Mooyer the results derived from his examination of the books of Schepeler & Co. was rejected by the referee on the ground that the books were in evidence and "spoke for themselves." This was not error. It does not appear that the referee or any other person could not, without the aid of expert testimony, ascertain from the books all the facts offered to be shown by the witness. It would not have been error for the referee to have allowed a witness, with the books before him, to give a summary of their contents; but this was a question of convenience simply and a matter within his discretion.

The defendant Kretz was asked whether, in 1868, he had a conversation with John F. Schepeler, one of the firm of Schepeler & Co., in respect to the balance due to him from the firm on account of his percentage, or share of the net profits of the business of 1863, and the question was objected to on the ground that the declarations of Schepeler & Co. were not admissible against the plaintiff, and more generally that the declarations of a former owner or assignor were not admissible against his assignee. The referee overruled the objection, and the witness testified that in October, 1868, he had a conversation with John F. Schepeler in regard to such balance, and the witness proceeded: "He (Schepeler) spoke about several business matters, and I asked him to settle this claim, and he promised that he would attend to it, but he never did so." In considering the correctness of the ruling of the referee admitting this evidence, it is important to bear in mind the position of the plaintiff and the nature of the action. The firm of Schepeler & Co. became bankrupts in 1869, and the plaintiff was appointed their assignee in bankruptcy in June of that

year. The mortgage which this suit is brought to foreclose was executed in March, 1869, to secure a loan made at or about its date from Schepeler & Co. to Kretz, and Kretz claimed in his answer to set off the four thousand dollars and interest alleged to be due him from Schepeler & Co. The plaintiff sues as assignee in bankruptcy, and has and claims no title to the mortgage in any other character. The conversation with John F. Scheleper in 1868, allowed to be proven if admissible, was clearly relevant and material. It was a recognition by Schepeler & Co. of the existence and validity of the claim made by Kretz, and tended to rebut any unfavorable inference which might be drawn from the delay on his part in presenting it.

In an action by Schepeler & Co. to foreclose the mortgage, no objection could have been made to the proof of the conversation in question. It would, as stated, have tended to establish the claim asserted by Kretz; and the point here is, whether it was admissible to establish or support a claim in his favor against the estate of the bankrupts. That the declarations of a bankrupt made before the bankruptcy are admissible for this purpose against his assignee in bankruptcy has been frequently decided in the English courts. (*Smallcombe* v. *Bruges*, 13 Price, 136; *Watts* v. *Thorpe*, 1 Camp., 376; *Brett* v. *Levett*, 13 East, 213; *Bateman* v. *Bailey*, 5 T. R., 512; *Dowton* v. *Cross*, 1 Esp., 168.)

In *Smallcombe* v. *Bruges* the question was whether the declarations of the bankrupt, made intermediate the act of bankruptcy and the issuing the commission could be shown, and it was held that as the bankrupt could not affect his estate by his acts after the act of bankruptcy, he could not do so by his declarations; but the court affirmed the doctrine of previous cases, that the declarations of a bankrupt made before the act of bankruptcy were admissible to charge his estate.

The case of *Paige* v. *Cagwin* (7 Hill, 361) is a leading case in this State on the subject of the admissibility of declarations made by the former owner of personal property, while he was the party in interest, against one deriving title from him. That was a suit by an endorsee against one of the makers of a

joint and several promissory note, transferred for value after maturity to the plaintiff. On the trial the defendant offered to prove the declarations of the payee of the note, made while he was the holder, to establish that the defendant executed the note as a mere surety for one of his co-makers, and an agreement between the payee and the principal debtor, after the note was made, extending the time of payment. The evidence was rejected and the ruling was approved by the Supreme Court, and the judgment of that court was affirmed by the Court of Errors. The opinion of Senator Lott in the Court of Errors contains an elaborate review of the authorities bearing upon the question. The learned reporter in the syllabus of the case states, as the proposition decided, that declarations made by the payee of a negotiable promissory note, while he owns and holds it, are not admissible against one to whom it is subsequently transferred *for value*, though the transfer is after maturity. This case has been frequently followed in our courts, and is regarded as establishing the general rule that the declarations of a vendor of chattels, or the assignor of a chose in action, made before he parted with his interest therein, are inadmissible against his vendee or assignee. (*Jermain* v. *Denniston*, 6 N. Y., 276; *Booth* v. *Sweezey*, 8 Id., 276; *Tousley* v. *Barry*, 16 Id., 497.)

But the qualification found in *Paige* v. *Cagwin*, that the vendee or assignee must be a purchaser for value in order to make the declaration inadmissible, is held to be an essential part of the rule. In *Brisbane* v. *Pratt* (4 Den., 63) this point was directly adjudicated, and it was there held that the declarations of a prior holder of a promissory note, transferred after maturity, are admissible against his endorsee, where the latter is not a holder for value. In *James* v. *Chalmers* (6 N. Y., 209) this case was questioned upon another point decided, viz.: that the presumption that an endorsee of a note is a holder for value does not exist when it is shown that he took it after maturity; but the decision on the other point was not questioned, and in *Green* v. *Givan* (33 N. Y., 343) the case of *Brisbane* v. *Pratt* was cited with approval upon the point

that the plaintiff must be a holder for value in order to exclude the declarations of a prior party in interest from whom he derived his title. Where a party against whom the declarations are offered claims as a privy by representation through the person making them, or is identified in interest with him, they are clearly admissible. The declarations of an intestate or of a testator touching the title to personal property, or establishing a defence to a claim asserted by the executor or administrator, or a demand against the estate he represents, are constantly received upon this ground. (*Brown* v. *Mailler*, 12 N. Y., 118; *Smith* v. *Smith*, 7 C. & P., 401.)

The position of an assignee in bankruptcy in respect to the estate of the bankrupt is in many respects analogous to that of executor or administrator, in respect to the estate of the decedent. He holds the assigned estate in trust for the bankrupt and his creditors. He is not a purchaser for value, and, in asserting a claim held by the bankrupt, he stands upon his right and title, and not upon any new and independent right or equity; whatever he recovers is for the benefit of the bankrupt, and constitutes a fund for the payment of his debts, and the bankrupt is entitled to any surplus remaining after they are satisfied. That this relation between a bankrupt and his assignee creates an identity of interest between them which makes his declarations evidence against his assignee is assumed in the opinion in *Paige* v. *Cagwin*.

We are of opinion, upon principle and authority, that the declarations of Schepeler & Co., received in this case, were properly admitted.

The declarations were made before the bankruptcy and against the interest of the person making them.

The assignee brought his action to enforce a demand in favor of Schepeler & Co., as to which Kretz had the right to set off any demand in his favor against the firm which was the subject of set off. (*Bathgate* v. *Haskin*, 59 N. Y., 533; *Hunt* v. *Chapman*, 51 Id., 555.) The declarations of Schepeler & Co. were, upon principle and authority, admissible, to establish or support a demand in his favor. In *Bullis* v.

*Montgomery* (50 N. Y., 352) the declarations there offered were made before any right or interest in the property was acquired by the persons whose declarations were offered in evidence; and the court held that the declarations were inadmissible. That case is not in conflict with the views here expressed. (See also *Bond* v. *Fitzpatrick*, 4 Gray, 89.) The statute of limitations had not run against the demand in favor of Kretz when Schepeler & Co. were adjudicated bankrupts. The assignee of a bankrupt stands in a position of trustee for his creditors, and the statute of limitations does not run against their claims against the estate of the bankrupt not barred at the time of the adjudication in bankruptcy. (*Ex parte* Ross, 2 Gl. & J., 330; *Parker* v. *Sanborn*, 7 Gray, 191; *Minot* v. *Thacher*, 7 Met., 348.)

There was, we think, no error committed on the trial, and the judgment should be affirmed.

## UNITED STATES DISTRICT COURT—E. D. VIRGINIA.

APRIL 16, 1879.

Where an order of seizure was given in an involuntary bankruptcy proceeding against goods in the hands of a purchaser by sale, afterwards adjudged to have been fraudulent; and, on this purchaser's petition, the goods were released to him on his giving a joint and several bond to the marshal, with sureties for the forthcoming of the goods, or else to answer the future judgment of the court in the matter; and plenary proceedings were afterwards instituted in the District Court on its equity side against the purchaser and his sureties in this bond, to set aside the sale; and a decree was in due course rendered, declaring the sale to have been fraudulent and decreeing the value of the goods to be paid by the fraudulent purchaser and his sureties; and the purchaser (not joined by his sureties) appealed to the Circuit Court, giving an appeal bond with new sureties; and, after decree of the Circuit Court affirming the decree below, the said purchaser appealed to the Supreme Court, giving an appeal bond with new sureties; and that appeal was dismissed; and then execution was taken out against the fraudulent purchaser, on which only a small part of the debt was made, leaving a large balance unpaid; and a petition was filed in the bankruptcy proceeding by the assignee against the sureties in the original delivery bonds (not making the fraudulent purchaser a party) for the payment of the balance due under the decree, and the said purchaser soon after died, insolvent, but leaving real estate, not sufficient to satisfy by sale the amount of the decree, *Held*, On de-

murrer and answer, that the assignee in bankruptcy could elect which of the several bonds to proceed upon, and might proceed upon the original delivery bond, and this being joint and several he might proceed against any one or more of the obligors without the other.

*Held also*, That the assignee might proceed by summary motion or petition, and need not resort to a plenary suit on the bond.

*Held also*, That the assignee might proceed at once against the sureties, in the original bond, and need not first subject the real estate of the fraudulent purchaser of the goods replevined before so doing.

## *STORRS BROS.* v. *ENGEL & SON. Ex parte E. M. GARNETT, Assignee in Bankruptcy.*

In June, 1870, Storrs Bros. filed in this court a creditor's petition in involuntary bankruptcy against Engel & Son, retail dry goods merchants of Richmond, Va. There was an adjudication of bankruptcy upon the petition on the 23d of the same month. Among other acts of bankruptcy relied upon, the petition charged that within six months before the filing of the petition, to wit, on the 16th of May, 1870, the defendants had sold, in block, the contents of their store in Richmond, being their whole stock of dry goods in trade, for a lump sum, to one Lisberger; that this was a sale in fraud of creditors, by an insolvent, in contemplation of bankruptcy; that Engel & Son's insolvent condition was known to Lisberger; that Lisberger was party to the fraud, and was then settling and disposing of the goods in question. The petition therefore prayed for an order of seizure against the goods. The petition was supported by the usual affidavits. The court thereupon immediately entered an order directing the seizure of the stock of goods; which was executed by the marshal on the same day.

On this same day Lisberger filed his petition denying the charges of the creditors' petition affecting the *bona fides* of his purchase of the stock of goods from Engel & Son, and praying that on his executing to the marshal a bond, with security approved by the marshal in such penalty as to the court might seem proper, conditioned for the forthcoming of the said goods or the value thereof, and to abide such further order as might be made by the court, the stock of goods might be returned to him.

The court on the next day granted the prayer of Lisberger's petition, in an order running nearly in the terms of its prayer; and on the same day, on Lisberger entering into a bond to the marshal, conditioned as described, in the penalty of eight thousand dollars, with M. Rosenbaum and two other persons (who have since become discharged bankrupts) as sureties, the marshal delivered the stock of goods to him. M. Rosenbaum was one of the principal creditors of Engel & Son, and proved his claim in bankruptcy. The bond was joint and several.

In due course of proceeding, Otway D. Brown was afterwards elected the assignee of Engel & Son in bankruptcy, and qualified as such. Brown was a clerk in the employment of Rosenbaum, who is a large wholesale dry goods merchant of Richmond. Counsel for most of the creditors desired a proceeding to be instituted for the purpose of annulling the sale which Engel & Son had made of the stock of goods to Lisberger, but Brown refused to take the proper steps for the purpose, alleging in excuse the opposition of his employer Rosenbaum to such a measure. Finally, after the lapse of several months, Brown was, on petition of creditors, removed as assignee, and the present assignee, E. M. Garnett, was appointed on the 4th of April, 1871.

On the eleventh day of that month Garnett filed a petition in the bankruptcy proceeding, charging in detail the fraudulent character of the sale, and praying that Lisberger, M. Rosenbaum, and the other sureties in the bond which had been given as mentioned should be made parties defendant.

This petition was alternately directed by the court to be treated as a bill in the equity side of the District Court, was referred to Rules, and was then proceeded in as a plenary suit in equity and not as a summary proceeding in bankruptcy.

The result of the litigation thus instituted was a decree of the District Court, made on the tenth day of May, 1876, pronouncing the sale of the stock of goods to Lisberger to have been fraudulent, and inasmuch as they had been sold by Lisberger after delivery to him, fixing their value when received

from Engel & Son at five thousand six hundred and eighteen dollars and fourteen cents, and decreeing the payment by Lisberger and his sureties to Garnett, assignee, of that sum with interest from the sixteenth day of May, 1870, until payment.

From this decree an appeal was taken by Lisberger to the Circuit Court of the United States for the District on the sixteenth day of May, 1876, when he gave an appeal bond with sundry persons, other than Rosenbaum, as sureties, in the penalty of nine thousand dollars, conditioned to prosecute an appeal with effect, or else to answer all costs and damages which the appellee might be decreed to pay.

On the 9th of October, 1877, the Circuit Court affirmed the decree of the District Court and directed execution to issue as at law for the amount of the original decree; whereupon Lisberger took an appeal to the Supreme Court of the United States, giving an appeal bond with sundry sureties other than those on the other two bonds, in the penalty of thousand dollars. This appeal was dismissed from the Supreme Court at its October Term of 1878.

On the 13th of November, 1878, executions were issued upon the decree of the Circuit Court upon which an aggregate sum of one thousand one hundred and eighty-five dollars and forty-eight cents has been realized, and from which it appears that Lisberger, who has since died, was insolvent. It is shown that he has no personal estate, and that he has real estate in the city of Richmond, though doubtless insufficient to satisfy the decree in favor of Garnett, assignee.

On the 17th of January, 1879, this assignee filed his petition in this court in the bankruptcy proceeding of *Storrs Bros.* v. *Engel & Son*, reciting the facts which have been detailed, and praying that M. Rosenbaum and the two sureties with him on the original delivery bond of the 18th of June, 1870, may be required to show cause here why they should not be required to pay the residue of the value of the stock of goods not satisfied by the executions mentioned, in accordance with their obligation given to this court as a condition of its sur-

render to Lisberger of the stock of goods in question at the date of this bond.

Rosenbaum demurred to this petition on the ground, *first*, that the proceeding should be a plenary suit at law on the bond, and that the defendant is not liable to be proceeded against by a summary petition in bankruptcy for a recovery upon this writing obligatory; and *second*, that any proceeding on the bond should have made Lisberger, the obligor, who was living at the filing of the petition, a party thereto.

The demurrer was overruled by the court, which held that the bond, having been given to the court itself, conditioned to abide its decree in the matter, no proceeding other than by motion or petition was necessary; and which also held that the bond being several, either obligor might be proceeded against severally, or all together, as the plaintiff in the decree might elect.

Thereupon the defendant Rosenbaum filed his answer to the petition, resisting its prayer on various grounds, viz.:

1. That the order of seizure made on the 17th of June, 1870, by virtue of which the stock of goods was seized, and the bond for their forthcoming or the value of them given, was issued without authority of law, that the said seizure was illegal, and that the said bond so taken was taken without authority of law and is in law null and void, and of no effect to bind the respondent.

2. That even if respondent were bound by said original bond, yet that he and his co-sureties were wholly absolved and discharged from all liability upon the same, by reason of the granting and allowance of the two appeals, and which were taken by Lisberger, and the execution of the two appeal bonds given thereon, to which bonds and proceedings this respondent was not a party; by which bonds and proceedings the responsibility for the said stock of goods was transferred to the sureties in the appeal bonds, who, respondent avers, were and are perfectly solvent, and liable in law to answer for the default of Lisberger.

3. That at the time that the decree of this court was pro-

nounced declaring invalid the sale by Engel & Son to Lisberger of the stock of goods in question on the 16th of May, 1870, the said Lisberger was amply responsible, and had sufficient goods and estate to pay the said decree in full; that if Lisberger has become insolvent it has been while the proceedings on said appeals were pending, and that the consequences of said insolvency cannot in law and equity be made to fall on this respondent, but should fall on those by whom said appeals were prosecuted and maintained.

4. That respondent is informed and believes that Lisberger died seized of valuable real estate in the city of Richmond; that the same ought to be sold in due course of law and the net proceeds applied in discharge, as far as it will go, of said decree; that until that be done there is no legal evidence of the insolvency of Lisberger or the inability of his estate to pay said decree; that before this respondent can in law be held for this decree, the extent of the deficiency of the estate to pay the same should be first ascertained by such sale and application of its proceeds, in order that respondent may have the benefit of the same, and to this end,

5. That the personal representative of Lisberger should be made a party defendant to this petition.

*E. G. Cannon*, for the defendant, cited *United States* v. *Kellogg* (7 Wallace, 361); *Catlett* v. *Brady* (9 Wheat., 553); 6 Gray, 141; 2 Gill and Johnson, 431; 6 Harris & Johnson, 431; Hempstead, 678 (note); 4 Smedes & Marshall (Miss.), 210); *Winston* v. *Rivers* (4 Stowart & Porter (Ala.), 269; 3 Washington C. C., 70; Powell on Appellate Proceedings, Sec. 17, p. 275, and Sec. 19, p. 371; *Nelson* v. *Anderson* (2 Call., 242 (287 M.); *Cook* v. *Marsh* (44 Ill., 178); *Patton* v. *Vially* (1 Cranch, 463); *Mayo* v. *Williams, adm'r* (17 Ohio, 244); *Gross* v. *Pearson* (2 Patton and Heath, 483); and *Clarkson* v. *Read* (15 Grattan, 288–298).

*John Howard* and *Robert Stiles*, for the petitioning assignee, cited Section 5024, Rev. Stat. U. S., at close of section, letter (C); Bump, 447; Brandt on Suretyship and Guarantee, Sec. 394, p.

535; *Dalby* v. *Jones* (2 Dev. 109); *Ashby* v. *Sharp* (1 Littell (Ky.), 156); *Smith* v. *Falconer* (11 Hun, 481—i. e., 18 N. Y. Sup. Ct.); *Hinckley* v. *Kreist* (58 N. Y., 583); *Shannon* v. *McMullin* (25 Grattan, 229-30); *Miller* v. *Dowse* (4 Otto, 444); and on the demurrer, *Taylor* v. *Currill* (20 How., 594); *Russel* v. *E. A. Co.* (3 McNaghtan and Gordon, 104); *Freeman* v. *Howe* (24 Howard, 457); 21 How., 506; 10 Wallace, 308; 11 id., 344–54; 1 Hughes, 634–59; *Inbusch* v. *Farwell* (1 Black, 572); *Blossom* v. *Railroad* (1 Wallace, 655); *Manfg. Co.* v. *St. Paul* (2 Wallace, 634); *Wiswall* v. *Campbell* (15 N. B. R., 421, 3 Otto, 351); *Smith* v. *Gaines* (3 id., 342); and *Moore* v. *Huntington* (1 Black, 572).

HUGHES, J.—The seizure of the goods in the possession of Lisberger was, after plenary proceedings in which both Lisberger and Rosenbaum were parties defendant, finally and solemnly adjudged to have been legal and proper; that is to say, the sale to Lisberger by Engel & Son was adjudged to have been fraudulent, null and void. The seizure of these goods by the marshal under the order of this court was therefore a seizure of the assets in bankruptcy of Engel & Son, fraudulently held by Lisberger. Rosenbaum joined in the bond for the delivery of the goods and for answering the decree of the court in the matter, and was party to the subsequent suit brought to test the validity of Lisberger's title to the goods.

Lisberger, for whom Rosenbaum became surety, has been the person who has prolonged the proceedings in the District, Circuit, and Supreme Courts, which delayed the Court of Bankruptcy in giving the order against his surety Rosenbaum, now asked for by the petition. The petitioning assignee has in no manner, direct or indirect, created any delay, or been guilty of any *laches*.

In the appeal from the decree of the District Court to the Circuit Court Lisberger was appellant. So also, from the affirming decree of the Circuit Court to the Supreme Court, Lisberger was appellant. In no instance and at no stage of

ment of an assignee, the court should not allow its process to interfere with the possession by the State assignee of the property; but since the trustee appeals to the Bankrupt Court for aid, reasonable conditions on granting the relief may be imposed, such as that he shall release the marshal from all damages for taking and keeping the property, pay his fees, and receive said property subject to the condition that he shall not dispose of any part thereof until a reasonable time after the appointment of an assignee, or the termination of the proceedings, except with the approval of the Bankrupt Court. 65

*In re* Freedom D. Beede.

The bankrupt's estate consisted in part of a farm on which he resided, which was subject to a mortgage. Under the laws of the State he was entitled to a homestead exemption to the value of five hundred dollars. The farm having been sold free of such homestead right, *Held*, That the bankrupt was entitled to a homestead of the full value of five hundred dollars in the equity of redemption, and that such sum should be paid to him out of the avails of the sale. 68

Johnson, Assignee, *v.* Helmstaedter *et al.*

An assignee in bankruptcy can maintain an action in the State courts to set aside conveyances of property made by a bankrupt in fraud of his creditors.

In a bill filed by an assignee in bankruptcy to set aside conveyances made by the bankrupt in fraud of creditors, it is sufficient to allege that the deeds were without consideration, and were designed merely to defraud creditors; a general charge or statement of the matter of fact is sufficient, and it is not necessary to charge the circumstances which may conduce to prove the general charge. 71

*In re* Bayly & Pond.

The failure of the bankrupt to perform a composition according to its terms does not clothe a creditor with the right to disregard the bankruptcy proceedings and sue for his whole debt.

After the filing of the voluntary petition in this case, a creditor commenced suit and prosecuted the same to final judgment. A composition having in the meantime been proposed, accepted, and confirmed, an injunction was granted staying the collection of the judgment. The creditor's debt was included in the debtors' statement, but was never proved. The debtors having failed to pay the first instalment of the composition to this creditor, and having failed to pay the second instalment when the same fell due, the creditor applied for a dissolution of the injunction, and the court ordered that the same be dissolved unless the debtors should forthwith carry out the composition or proceed with the bankruptcy proceedings within thirty days. On petition to review said order, *Held*, That the injunction was properly granted, and that the court was right in refusing to dissolve it. 73

*In re* Miller. *Ex parte* Monson Savings Bank.

The creditor bank held a mortgage for eight thousand dollars given by the bankrupt and one S. M. upon land owned by them in equal shares. After the bankrupt had been adjudicated and an assignee appointed, the bank, without notice to the assignee or leave of court, sold the mortgaged premises at auction for one thousand dollars and claimed to prove for the balance of the debt. It was afterwards agreed by the parties that the value of the land was six thousand dollars, and that the sale had been made "without any thought of the effect it might have upon the balance of their claim in bankruptcy." *Held*, That no sufficient equitable excuse was given for the failure to comply with the law in disposing of the security, and that the creditor could not prove for any sum whatever. 78

*In re* Peter Mead.

One who, with notice of the fraud, purchases property fraudulently conveyed by a bankrupt, has no right, after being compelled to surrender it to the assignee, to reimbursement either for improvements upon the premises or for moneys advanced to reduce incumbrances. 81

Von Sachs, Assignee, *v.* Kretz *et al.*

Evidence of declarations of a bankrupt made before the bankruptcy are admissible against his assignee to support a claim against the estate.

In a suit by an assignee in bankruptcy of a firm to foreclose a mortgage which had been given to the firm, the defendant may set off any demand in his favor against such firm which is the subject of set-off.

The statute of limitations does not run against claims of creditors of a bankrupt which were not barred at the time of adjudication. 83

Storrs Bros. *v.* Engel & Son. *Ex parte* Garnett, Assignee.

Where an order of seizure was given in an involuntary bankruptcy proceeding against goods in the hands of a purchaser by sale, afterwards adjudged to have been fraudulent; and, on this purchaser's petition, the goods were released to him on his giving a joint and several bond to the marshal, with sureties for the forthcoming of the goods, or else to answer the future judgment of the court in the matter; and plenary proceedings were afterwards instituted in the District Court on its equity side against the purchaser and his sureties in this bond, to set aside the sale; and a decree was in due course rendered, declaring the sale to have been fraudulent and decreeing the value of the goods to be paid by the fraudulent purchaser and his sureties; and the purchaser (not joined by his sureties) appealed to the Circuit Court, giving an appeal bond with new sureties; and, after decree of the Circuit Court affirming the decree below, the said purchaser appealed to the Supreme Court, giving an appeal bond with new sureties; and that appeal was dismissed; and then execution was taken out against the fraudulent purchaser, on which only a small part of the debt was made, leaving a large balance unpaid; and a petition was filed in the bankruptcy proceeding by the assignee against the sureties in the original delivery bonds (not making the fraudulent purchaser a party) for the payment of the balance due under the decree, and the said purchaser soon after died, insolvent, but leaving real estate, not sufficient to satisfy by sale the amount of the decree, *Held*, On demurrer and answer, that the assignee in bankruptcy could elect which of the several bonds to proceed upon, and might proceed upon the original delivery bond, and this being joint and several he might proceed against any one or more of the obligors without the other.

*Held also*, That the assignee might proceed by summary motion or petition, and need not resort to a plenary suit on the bond.

*Held also*, That the assignee might proceed at once against the sureties, in the original bond, and need not first subject the real estate of the fraudulent purchaser of the goods replevined before so doing. 90

THE

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# SYNOPSIS OF CASES, No. 3.

*In re* Ives & Porter.

Where the record of the Bankruptcy Court on its face shows that the court had jurisdiction to pass a decree adjudicating the debtor to be a bankrupt, and that such a decree was passed, it is conclusive as to the jurisdiction of the Bankruptcy Court, unless assailed in a *direct* proceeding to set aside or annul the same.

While such a decree remains in force, the bankrupt's discharge cannot be opposed on the ground that the facts stated in the petition of the debtor to be adjudicated a bankrupt, as to the length of his residence within the district, are not true. 97

*In re* May & Berwin.

Where one of the members of a firm has withdrawn moneys therefrom with intent to use them for his private purposes, but such withdrawal was not fraudulent as against his copartners, the assignee of the firm cannot prove therefor against the separate estate of such partner, even if the firm estate was known to be insolvent at the time, and the withdrawal was made with knowledge of the insolvency. 101

*In re* Henry Clews *et al.*

A creditor whose debt was created by the fraud of the bankrupt does not, by proving his claim and taking a dividend, waive his right to maintain an action for the balance of the debt. 109

*In re* Morganstern.

No act done in composition proceedings, though of the description of the offence mentioned in the eighth clause of Section 5110, R. S., can be set up against the discharge of a bankrupt by decree of the court. 111

Gifford *et al. v.* Helms *et al.*

District Courts do not possess the power, under the twenty-fifth section of the Bankrupt Act, to order in a summary way the sale of property, real or personal, although the same is claimed by the assignee, even though the title thereto is in dispute, if it also appears that the estate is in the actual possession of a third person holding the same as owner, and claiming absolute title to and dominion over it as his own property, whether derived from the debtor before he was adjudged bankrupt or from some former owner.

The bankrupt executed trust deeds of certain property. He afterwards conveyed his equities in said property to his son, and in the following year was adjudged bankrupt and an assignee appointed. Three years later the assignee applied to the court for leave to sell the assets of the bankrupt not including the equities so conveyed to the son. The order of the court however included the property conveyed to the son, and the same was accordingly sold to complainant with the other assets. In a suit brought by the purchaser to set aside the conveyance to the son, *Held*, That the assignee's right of action, if any, was acquired at the date of his appointment, and was barred by the statute of limitations before the sale, and that complainant did not, by the conveyance made to him upon such sale, acquire any greater rights than those possessed by the assignee. 113

*In re* Howard Snelling.

Where the creditors have full knowledge of all the facts, and the debtor, who is doubtful of obtaining his discharge or who wishes to proceed at once with his business, as a fair compromise of possible litigation, induces his friends to pay more in composition than his estate could pay in bankruptcy, *Held*, That the composition stands well before the court.

Where a creditor considers himself and is considered by the debtor to be fully secured, although in fact he is not, he is not to be counted as a creditor merely to defeat a composition to which the requisite number of creditors have assented. 120

these proceedings has the assignee Garnett committed any *laches*, or instituted any proceeding of a dilatory character.

It follows, now that the invalidity and nullity of Engel & Son's sale to Lisberger, and the fraudulency of Lisberger's original possession of the goods, have been finally determined, that the assignee, Garnett, is in equity entitled to proceed against the surety or sureties in either one of the bonds that have been given which he may elect to proceed against. He is not bound to begin with the sureties last responsible, and proceed with each set until he makes good his claim. He may begin with either surety or set of sureties. He has chosen to do so here against the sureties in the first bond, and the court will sustain him in so doing, and grant this petition; for that bond stands for the goods originally seized. (*Inbush* v. *Farwell*, 1 Black, 572.)

The same principle applies as to Lisberger's property. The assignee is not bound to await the result of proceedings to subject Lisberger's property to the satisfaction of the claim of the assignee. The latter may proceed at once against Rosenbaum. I think this is in accordance with the equity of the case, and with the teaching of the authorities on the subject.

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UNITED STATES CIRCUIT COURT—E. D. MISSOURI.

MARCH TERM, 1879.

Where the record of the Bankruptcy Court on its face shows that the court had jurisdiction to pass a decree adjudicating the debtor to be a bankrupt, and that such a decree was passed, it is conclusive as to the jurisdiction of the Bankruptcy Court, unless assailed in a *direct* proceeding to set aside or annul the same.

While such a decree remains in force, the bankrupt's discharge cannot be opposed on the ground that the facts stated in the petition of the debtor to be adjudicated a bankrupt, as to the length of his residence within the district, are not true.

## *In re IVES and PORTER.*

Ives and Porter, the bankrupts, filed a voluntary petition in bankruptcy in the District Court for this district, on November

1, 1877, and on the 10th day of the same month were adjudged to be bankrupts. The petition was in due form, and contained all the necessary allegations to show the jurisdiction of the court, and that the petitioners were entitled to be adjudicated bankrupts.

An assignee was appointed, and the estate of the bankrupts administered—all in the usual way. Among other creditors, one Harvey Bates proved a claim in bankruptcy.

Everything proceeded in the ordinary course, and on June 25, 1878, the bankrupts filed their petition to be discharged, and the matter came on for hearing before the register, and no objection being made, the register reported that they were entitled to their discharge. After the report was made, the court allowed the said Bates to file his objections to the discharge. On the 2d day of August, 1878, Bates filed his objections, containing four specifications, the fourth specification being to the effect that the court had no jurisdiction to grant a discharge, because the bankrupts had not resided in the Eastern District of Missouri for six months next preceding November 1, 1877, nor for the longest period during said six months, but only acquired a residence in said district on September 15, 1877, prior to which they had resided in Indiana. The bankrupts, reserving objections, answered, denying all the specifications, and alleging that they were *bona fide* residents of the district for the six months immediately preceding the filing of the petition in bankruptcy.

The matter was heard upon the proofs, and the court, on September 9, 1878, overruled the first three specifications and sustained the fourth, and thereupon "ordered that the discharge of the bankrupts herein be refused, and that the petition for adjudication heretofore filed by the bankrupts herein, together with all proceedings had thereunder, be and the same are hereby dismissed at the costs of the bankrupts."

To review this order, the present petition is filed.

*J. La Due* and *William R. Walker*, for the bankrupts.
*John D. Davis*, for Harvey Bates.

DILLON, J.—The decision made by the District Court is supported in two opinions of an able and experienced bankruptcy judge. (*In re* Little, 2 N. B. R., 294; *In re* Leighton, 5 id., 95.) A contrary opinion was given by another very learned judge. (*In re* Burke, 3 N B. R., 296.)

The question is one of considerable importance doubtless, and I have considered it with some care; but inasmuch as the Bankrupt Act is now repealed, I shall dispose of it without any extended argument in support of my conclusion.

The District Court not only has bankruptcy jurisdiction, but is the only court of original jurisdiction in bankruptcy. The petition filed in that court by the bankrupts was in due form in every respect, and set forth all the facts as to residence and otherwise necessary to state a case within the jurisdiction of the court. An adjudication of bankruptcy was duly passed and entered; an assignee was appointed; an assignment was executed; debts were proved; meetings of creditors held; and the estate administered. In due course, after the lapse of several months, the bankrupts applied for a discharge, whereupon one of the creditors, who had before proved a claim, appeared and opposed the discharge on the ground that the court had no jurisdiction to grant it by reason of the existence of a fact *en pais*, viz., want of residence in the district for the requisite length of time before the filing of the petition in bankruptcy.

It is my judgment that the effect of a decree of adjudication cannot be thus overcome. This objection is not among those specified in the act as grounds of opposing the discharge. (Rev. Stats., Secs. 5110, 5111.) The principle decided in *Michaels* v. *Post* (12 N. B. R., 152, 21 Wall., 398) and in *Sloan* v. *Lewis* (12 N. B. R., 173, 22 Wall., 150) is inconsistent with the right to attack the decree of adjudication in this manner. "Such a decree," says the Supreme Court, in the case first cited, "is in the nature of a decree *in rem*, as respects the status of the party; and in case the court rendering it has jurisdiction [a case within which was shown by the petition filed therein], it is only assailable by a direct proceeding in a

competent court, if due notice was given, and the adjudication was correct in form." So in the case of *Sloan* v. *Lewis*, where the record of the Bankruptcy Court showed on its face the jurisdiction, it was held that the adjudication of bankruptcy was conclusive in a collateral action. "Where the record [of the Bankruptcy Court] shows jurisdiction," says the chief justice, "an adjudication of bankruptcy can only be assailed by a *direct* proceeding in a competent court." (22 Wall., 157.) An instance of such a direct proceeding is presented in *Re* Goodfellow (3 N. B. R., 452).

The decree adjudging the debtors to be bankrupt was never attacked in the District Court. No petition or other direct proceeding to set the same aside was ever made. It is not attacked in the objections filed to the discharge of the bankrupts.

It remains, to this present, unassailed and unreversed. The estate of the bankrupts has been administered under it. It seems to me to be against the general principle of the law relating to the effect of judgments and decrees of courts, and without any support in the special provisions of the Bankrupt Act, to allow a judgment, and especially such a judgment as a decree of adjudication in bankruptcy, to be overthrown and all that has been done under it held to be void, in a proceeding in which the decree is not directly attacked, and where the question only arises on the incidental application of the bankrupts for their discharge.

The decisions in the District Court holding a contrary view were made before the decisions of the Supreme Court above cited, and are inconsistent with them, unless it can be held that the opposition to a discharge on this ground is a direct attack upon the decree adjudging the debtors to be bankrupt—a position which I cannot admit to be sound.

The order of the District Court dismissing the petition for adjudication is reversed, and the court ordered to overrule the fourth specification in opposition to the discharge, and to grant the discharge of the bankrupts.

Ordered accordingly.

UNITED STATES DISTRICT COURT— S. D. NEW YORK.

MARCH 15, 1879.

**Where one of the members of a firm has withdrawn moneys therefrom with intent to use them for his private purposes, but such withdrawal was not fraudulent as against his copartners, the assignee of the firm cannot prove therefor against the separate estate of such partner, even if the firm estate was known to be insolvent at the time, and the withdrawal was made with knowledge of the insolvency.**

## *In re AUGUST MAY and AARON BERWIN.*

THE facts appear fully in the opinion.

*C. W. Bangs*, for motion.
*T. Saunders*, contra.

CHOATE, J.—This is a motion to expunge a proof of debt filed by the assignee of the two bankrupts against the individual estate of Berwin, one of the bankrupts.

The deposition of the assignee avers "that the said Aaron Berwin, one of the said bankrupts, and a member of the firm composed of them, and called May & Berwin, in and before the filing of said petition (for adjudication) was, and still is, justly and truly indebted to deponent, as assignee of said bankrupts, in the sum of thirteen thousand six hundred and fifty dollars, and interest, as hereinafter stated. That such indebtedness has for consideration, and arose in the following manner: at the times, hereinafter mentioned, said Aaron Berwin, being a copartner in said firm, composed of himself and August May, both above named, and being then insolvent, did fraudulently and with a view to benefit his separate estate and creditors, if any, at the expense of the creditors of his said firm, draw out of and receive of the firm bank account and assets the following sums of money, to wit: July 11, 1872, five thousand dollars; July 15, 1872, one thousand five hundred dollars;

August 2, 1872, one thousand five hundred dollars; November 26, 1872, five thousand six hundred dollars; altogether, thirteen thousand six hundred and fifty dollars, and thereupon paid twelve thousand eight hundred dollars of the same to George King, his brother-in-law, upon an alleged individual debt; that said money had been returned to the individual estate of said Berwin." The executors of one King, who proved a debt against the individual estate of Berwin, have taken these proceedings for the examination of this proof of debt, and now move that it be examined.

Some technical and formal objections are made to the proof filed, which it is unnecessary to discuss, as they are susceptible of amendment if the assignee of the joint estate has the right to make proof of this claim against the separate estate of Berwin.

The facts shown in the case are that May and Berwin entered into copartnership in or about the year 1864, that Berwin put in sixteen thousand dollars as capital. The amount that May was to put in does not certainly appear, but it was less than Berwin was to put in. Both were to give their time and services in the business, and they were to share equally in the profits. They began under written articles, which appear to have been lost; and after the term ran out, they continued the business without articles or definite agreement as to the term of the partnership. Interest was not allowed or paid on their capital accounts. The firm did business on credit, and at all times had occasion to borrow money to carry it on. In or about the year 1869, Mr. Berwin drew out funds which before that he had had invested in some other business, and he paid these moneys, to the amount of about forty-six thousand dollars, into the firm of May & Berwin. This money stood on the books of the firm to the credit of an account opened under the name of P. Berwin & Bro.; but it was understood by both parties to be, and was in fact when paid in, the money of Berwin. It was treated in all respects by the firm as money loaned by Berwin to the firm. Interest was allowed on it, and credited in the account. At the several times

stated in the proof of debt, Berwin drew out of the firm's bank account the several sums therein specified, and these payments were debited to this account on the books of the firm. There was no agreement whatever at the time the money was paid in, nor afterward, between May and Berwin as to the length of time that the firm should have the use of it.

There was no agreement between them that it was, or was to be treated, as capital. While it was in the firm, the firm had the use of it as of any other moneys borrowed. When Berwin drew out the sums above referred to, amounting in all to thirteen thousand six hundred and fifty dollars, or at some of the times when he drew out parts of it, May objected to his doing so; but there is no evidence that he put his objection on the ground that in drawing it out Berwin had violated any partnership obligation towards him or any agreement between them. He testifies indeed that he did not suppose Berwin had a right to draw it out, but he states no fact whatever tending to show that any agreement or obligation was violated in his doing so. The firm continued to do business, borrowing money, getting discounts, paying its notes and other obligations, buying and selling goods, and enjoying a large credit, until the 13th of December, 1872, when it suspended payment, and on the 20th of the same month was put by its creditors into bankruptcy. At the time Berwin drew out these sums he had overdrawn his personal account with the firm about nineteen thousand dollars, and May had overdrawn his about twenty-two thousand dollars. A critical examination of the assets and liabilities of the firm would probably have disclosed that as early as July, 1872, when the first of these sums mentioned in the proof of debt was drawn out, the capital of the firm was gone, and that when the last of them was drawn out the firm was insolvent; but the evidence does not warrant the conclusion that any of this money was drawn out when Berwin contemplated insolvency or bankruptcy, or with intent on his part to withdraw it from the firm credits for the purpose of giving a preference in the distribution of the assets to his

individual over his firm credits. For aught that appears, he may then have believed that the firm would go on and all its obligations be paid.

The testimony of the assignee, that some time in the year 1870 the partners both told him that Mr. Berwin had put more money into the firm, and that of another witness who had dealings with the firm, that in 1872 they told him that Berwin had put more capital into the concern, is not sufficient to impress on this money, as held by the firm, the character of capital rather than money loaned, which the evidence shows it clearly to have been. As to the language used, these witnesses are to some extent contradicted, and even if their recollection as to the words used were accepted as wholly trustworthy, they testify to nothing which impairs the right of Berwin to draw this money out when he pleased as between him and his partner May.

The general rule that for moneys drawn out by a partner the joint estate cannot prove against the individual estate, is admitted by the counsel for the assignee; but it is claimed that where the firm was insolvent at the time the money was drawn out with the intention to give a preference to individual creditors over firm creditors, by using it in the payment of individual debts, then the withdrawal of it is fraudulent against the firm creditors, and the assignee of the firm can make proof against the individual estate. The authorities, however, do not sustain the claim of the assignee as applied to the present case.

The right of the firm estate to prove a debt in bankruptcy against the separate estate of one of the partners has been much discussed in England. In the case of *Ex parte* Harris (2 Ves. & B., 212), Lord Eldon thus states the rule and the history of it: "There has long been an evil of the law which prevailed in the time of Lord Hardwicke, whose opinion appears to have been, that if the joint estate lent money to the separate estate of one partner, or if one partner lent to the joint estate, proof might be made by the one or the other in each case. That has been put an end to among other principles, upon this certainly,

that a partner cannot come into competition with separate creditors of his own, nor as to the joint estate with the joint creditors. The consequence is, that if one partner lends one thousand pounds to the partnership, and they become insolvent in a week, he cannot be a creditor of the partnership, though the money was supplied to the joint estate; so if the partnership lends to an individual partner, there can be no proof for the joint against the separate estate; that is, in each case, no proof to affect the creditors, though the individuals may certainly have the right against each other. The opinion of Lord Talbot seems also to have been in favor of this proof. But in and previously to the year 1790 great discussion took place at this bar, the result of which, according to Lord Thurlow's opinion, was expressed particularly in the case of Dr. Fendal and Lodge. The former, a physician, embarked a very large property, his whole fortune, in a partnership with Lodge, whom he permitted to have the whole management, and a bankruptcy ensuing, Lord Thurlow held that, as it was with knowledge and permission of Fendal that the whole management of the property was with Lodge, he was authorized to do as he thought fit with the partnership property, and Fendal must therefore abide the consequences of what had been done most improperly, but under his own authority, most imprudently given, and there could therefore be no proof. The law has been clear from that time that to make out the right to prove by one estate or the other, it must be established that the effects joint in several have been acquired by the one or the other improperly and fraudulently, in the sense that they have been acquired under circumstances from which the law implies fraud, or in the sense to increase his own means out of the partnership estate. Lord Thurlow, by "fraud," intended to express what he thought necessary to distinguish that from taking by contract or loan, or without the express or implied authority of the other partner, and that such act must amount to fraud. Upon this case I formerly expressed my opinion, and I now lay down, that if in either the expressed or implied terms of an agreement for a partnership there is a prohibition of the act, and it is done without th-

knowledge, consent, privity, or subsequent approbation of the other partner before the bankruptcy, and to the intent to apply partnership funds to private purposes, that is *prima facie* a fraud upon the partnership. To illustrate this, I will put the simple case of a partnership between two, and by the articles all the money is to be paid into their joint names at a particular bank, and they prohibited from drawing out more than fifty pounds a month each for individual purposes; that during the month of January they mutually observed these articles by paying in; and on the 1st of February, one, instead of fifty pounds, draws out five hundred and fifty pounds, and upon the next day a bankruptcy happens; if it is made out that this overdrawing was for private purposes, and without the knowledge, consent, privity, or subsequent approbation of the other, as it was for private purposes, and therefore must be for the increase of the individual estate, and as it was against the covenanted rights, or rather the prohibitions affecting both, and without the knowledge, consent, privity, or subsequent approbation of the copartner, it is as much a fraud within Lord Thurlow's rule as if, according to the expression I am informed I formerly used, he had stolen the property. This rule is again applied and illustrated in the cases of *Ex parte* Yonge (3 Ves. & B., 31) and *Ex parte* Turner (4 Dea. & Ch., 169). In the case of *In re* Lane (12 N. B. R., 135), Lowell, J., says: "The general rule in bankruptcy is that there can be no proof between the joint and separate estate of partners, unless there is a surplus of the joint estate to be divided. This rule was adopted partly as being upon the whole equitable, on the supposition that the joint creditors had given credit to the joint estate, and the separate creditors to the separate estates, respectively, and partly, I apprehend, upon the consideration that there is no such thing as a debt between partners or between a partner and his firm, in respect to partnership matters, excepting upon a winding up of all the affairs, and it was found to be very expensive and inconvenient to go into a general accounting in bankruptcy, and it was thought more expedient as well as more just to take the estates as the parties left them."

To the same effect is the opinion of Hopkins, J., in *Re* McEwen (12 N. B. R., 11). (See also *In re* Jay Cooke & Co., Id., 31.)

Without calling in question the exceptions established by these English cases, which appear to be recognized in the cases last cited, as applicable under our Bankrupt Law, it is evident that the fraudulent withdrawal of funds from the firm assets, upon which the exception rests, is a withdrawal fraudulent as against the firm or the other copartners. It is not enough, if the partner withdrawing the money violated no duty towards his copartners in withdrawing it, that he did so with an intent to use it for his private purposes, nor does there seem to be any authority for proof by the firm against the separate estate, when there is no such fraud as against the copartner, even if the firm estate is known to be insolvent at the time and the act is done with knowledge of the insolvency.

In the present case, Berwin had a perfect right, as between himself and May, to withdraw this money. He had not agreed to leave it in the business of the firm for any definite time. It was a loan payable on demand. More than all that, he had contracted to leave in the business was left there still. He was the general financial manager of the concern, and had undoubted authority to contract for and to pay off loans to the firm. May's objection merely expressed his displeasure at the act. He had no right to object to the act as in violation of any expressed or implied contract between himself and his partner. Moreover, if it would aid the assignee to show that, when the moneys were withdrawn, Berwin contemplated the winding up of the firm business in bankruptcy or insolvency, or that they must stop, the proof on that point is deficient.

The counsel for the assignee has cited, in support of his claim to prove this debt, certain cases in which the transfer of the partnership assets by the firm to one of the partners when the firm was insolvent, and with design to interfere with the proper and equitable distribution of the assets, as between firm and individual creditors, has been set aside as fraudulent against the firm creditors. (*Collins* v. *Hunt*, 4 McLean, 186;

*In re* Cook, 3 Bliss, 122.) These cases have no application to the present. They are cases respecting the marshalling of assets as between the joint and separate estates, and not cases touching the right to prove debts as between the joint and separate estates. The principles governing the two classes of cases are distinct, and if the assignee's claim were good under these authorities, it would be not for a dividend as a creditor, but for certain money or property in specie as belonging to the joint estate. But even those cases of marshalling assets, if they afforded an analogy, would not aid the assignee in this case, since the transfer of the firm assets to one of the copartners, where the firm is known to be insolvent, is not held to be void if made in *good faith*, though the necessary *result* of it will be if the firm's affairs have to be wound up in bankruptcy that the relative interests of the different classes of creditors will be thereby seriously altered. (*In re* Long & Corey, 9 N. B. R., 227, 7 Ben., 141; *In re* Tomes, 19 N. B. R., 36.)

The assignee has been held estopped by a stipulation entered into by him with this very creditor, George King, and under which stipulation King repaid to him, as assignee of Berwin, certain money which he still retains, from claiming that money as belonging to the joint estate. Whether that stipulation and the proceedings had in this and other courts, since it was given, would also prevent him from proving a dividend against the separate estate of Berwin, thereby taking a part of the money for the joint estate, as is claimed by the counsel for King's executors, is a question that need not be determined, since upon the facts shown the joint estate is not entitled in any event to prove against the separate estate of Berwin for these moneys withdrawn by Berwin, and used by him in paying his own debts.

Motion to expunge granted.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

NOVEMBER 30, 1878.

A creditor whose debt was created by the fraud of the bankrupt does not, by proving his claim and taking a dividend, waive his right to maintain an action for the balance of the debt.

## *In re HENRY CLEWS et al.*

THE facts appear fully in the opinion.

*Abbott Bros.*, for motion.
*W. L. Sessions*, contra.

CHOATE, J.—This is a motion to stay proceedings in a suit brought in a State Court against the bankrupts, and to set aside a warrant of arrest issued in that suit against the bankrupt Clews.

The bankrupts have received their discharge in bankruptcy, and it is claimed on their behalf that this creditor has waived his right to maintain any action against them for the cause of action sued on, even if that cause of action was created by the fraud of the bankrupts, because they came in and proved their debt and took a dividend.

The statute provides: "No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him, and all proceedings already commenced, or unsatisfied judgments already obtained therein against the bankrupt shall be deemed to be discharged and surrendered thereby." (Stat. 1867, Ch. 176, § 21.) And by the 33d Section of the same act it was provided that "no debt created by the fraud or embezzlement of the bankrupt, etc., shall be discharged under this act, but the debt may be proved and the dividend thereon shall be a payment on account of said debt." In *Re* Robinson (2 N. B. R., 342, 6 Blatchford, 253) Mr. Justice Nelson held that the effect of these provisions,

considered together, was that in case of a fiduciary debt or debt created by fraud coming within the class of debts described in Section 33, the creditor might prove his claim and take his dividend, and that he did not thereby waive his right to maintain an action for the balance of the debt. That case is decisive of this point in the present case. It is urged that that decision is clearly in conflict with the decisions of the Federal Courts, including the Supreme Court, under the Fifth Section of the Bankrupt Law of 1841, it being held under that act that a fiduciary creditor who proved his claim thereby waived his right to maintain an action for the debt. (*Chapman* v. *Forsyth*, 2 How., 202; *In re* Tebbetts, 5 Law Reporter, 259; *In re* Comstock, 5 id., 163; and other cases.)

But there is no such conflict. The provisions of Section 5 of the Act of 1841 were substantially the same as those of Section 21 of the Act of 1867, cited above; but the Act of 1841 contained no similar provision to that quoted above from Section 33 of the Act of 1867, permitting the creditor to prove his debt and making the dividend a receipt on account, and there were other provisions of the Act of 1841 indicating a different policy from that so clearly appearing in Section 33 of the Act of 1867.

The decision in *Robinson's case* proceeds upon a difference in the language of the two acts, and was in accordance with the obvious meaning of the Thirty-third Section of the Act of 1867.

The case made by the complaint and the affidavits on which the order of arrest was issued is a clear case of a debt created by the fraud of the bankrupt within the meaning of the Thirty-third Section of the Bankrupt Law. The case as stated is that the defendants were agents of the plaintiffs to collect drafts and other evidences of debt belonging to them; that while so employed they became insolvent, and with full knowledge of such insolvency nevertheless collected the drafts and passed the proceeds to the credit of the plaintiff. In other words, the bankrupts (as the case is stated against them) receiving a draft of the plaintiffs upon the trust in respect to them, which they knew they could not perform otherwise than by keeping them

and their proceeds wholly distinct and separable from all other funds, turned them into money, and mingled the money with their own, so that they could no longer be traced. They thereby ceased indeed to hold the drafts or the proceeds in trust, and became debtors for the amount to the plaintiffs. The very creation of this debt, however, was an actual fraud and a violation of a duty which they had assumed in a fiduciary character.

The point made by the bankrupts might be good, if they had, without knowledge of their insolvency, collected the drafts and passed the proceeds to the credit of the plaintiffs, as they claim in their answer was the fact.

In that case the decisions that have been made in the cases of factors and others, who have been held not to be liable to arrest after discharge in bankruptcy, might be in point. But the case here made is a case of positive fraud, or fraud in fact, and not one of implied fraud or fraud in law. (*Neal* v. *Clark*, 5 Otto, 704; *S.C. sub nom. Neal* v. *Scruggs*, 17 N. B. R., 102.) Still the question of fact on the issue of fraud being triable in the State Court, that question does not come up for determination in this court.

Motion denied, and stay of proceedings vacated.

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UNITED STATES DISTRICT COURT—W. D. PENNSYLVANIA.

MARCH 7, 1879.

**No act done in composition proceedings, though of the description of the offence mentioned in the eighth clause of Section 5110, R. S., can be set up against the discharge of a bankrupt by decree of the court.**

## *In re MORRIS and NATHAN MORGANSTERN.*

RULE to show cause why the specifications of objections filed should not be stricken off as insufficient in law, and the said petitioners be discharged.

The facts appear fully in the opinion.

*Malcolm Hay*, for opposing creditors.

*S. Schayer, Jr.*, for bankrupts.

In re Morganstern.

KETCHAM, J.—The specifications of objections to discharge in this case are filed under the eighth clause of Section 29 of the Act of March 2, 1867 (Sect. 5110, Rev. Statutes), which reads as follows: "If the bankrupt, or any person in his behalf, has procured the assent of any creditor to his discharge, or influenced the action of any creditor at any stage of the proceedings by any pecuniary consideration or obligation, his discharge shall not be granted."

It is charged that the petitioners, in proceedings in composition in this case, by pecuniary consideration or obligation, influenced certain creditors to contribute their votes to constitute the legal quorum to adopt the resolution. That the sum of eighteen hundred dollars was promised the said creditors on confirmation of the composition, and that said creditors voted for the composition.

The composition failed for want of sufficient votes, and the bankrupts have gone through bankruptcy up to the application for discharge. Can the specifications, if true, defeat their discharge? Does the clause "at any stage of the proceedings" include the composition proceedings? Composition proceedings under the Bankrupt Law are, no doubt, proceedings in bankruptcy; but are they so to be considered with reference to the prohibitory clause denying the bankrupt his discharge for the causes therein set forth? Proceedings in composition constitute a mode of distributing *pro rata* the value of the estate of the debtor according to the estimate of a quorum of creditors, subject to the approval of the court. The proceedings are chiefly an amicable arrangement between the debtor and his creditors. The debtor has simply to pay what he has agreed to pay, and he is *ipso facto* discharged. No penalties are provided for punishing specified offences of the parties. The arrangement is left to the approval or non-approval of the court, looking only to the question: What is best for all concerned, according to equity and justice? If adopted and carried out, it ends the bankruptcy, and the bankrupt discharges himself.

Composition was not thought of when the section embracing the clause referred to was enacted. For more than seven years

before composition was engrafted on our system of bankruptcy men were discharged by decree of the court; and all that time this section containing this clause was in force, and of course was only aimed at the offences specified as taking place in regular bankruptcy. There is nowhere in the law any provision extending this clause to things done in composition as if done in bankruptcy. It could not operate on discharge in composition if it were extended. Composition has its own discharge, which could not be reached by it. The clause is penal in its nature, and cannot be extended by mere implication.

Composition and bankruptcy are both complete systems looking to different modes of discharge. Neither requires the other, nor, after the original petition, is any part of the one proceedings in the other. The proceedings in bankruptcy of themselves alone, and excluding entirely the proceedings in composition, form the basis of the decree of discharge Not without the most miscellaneous confusion of two entirely different proceedings can *anything done or any time* in composition proceedings be called "any stage of the proceedings" in bankruptcy resulting in a decree for a discharge. I do not think anything wrong done in composition proceedings, though of the description of the offence in this clause, can be set up against the discharge of the bankrupts by decree of the court.

Rule absolute.

## UNITED STATES SUPREME COURT.

### OCTOBER TERM, 1878.

District Courts do not possess the power, under the twenty-fifth section of the Bankrupt Act, to order in a summary way the sale of property, real or personal, although the same is claimed by the assignee, even though the title thereto is in dispute, if it also appears that the estate is in the actual possession of a third person holding the same as owner, and claiming absolute title to and dominion over it as his own property, whether derived from the debtor before he was adjudged bankrupt or from some former owner.

The bankrupt executed trust deeds of certain property. He afterwards conveyed his equities in said property to his son, and in the following year was adjudged bankrupt and an assignee appointed. Three years later

the assignee applied to the court for leave to sell the assets of the bankrupt not including the equities so conveyed to the son. The order of the court however included the property conveyed to the son, and the same was accordingly sold to complainant with the other assets. In a suit brought by the purchaser to set aside the conveyance to the son, *Held*, That the assignee's right of action, if any, was acquired at the date of his appointment, and was barred by the statute of limitations before the sale, and that complainant did not, by the conveyance made to him upon such sale, acquire any greater rights than those possessed by the assignee.

## *WILLIAM H. GIFFORD et al.* v. *JOHN P. HELMS et al.*

THE facts appear fully in the opinion.

CLIFFORD, J.—District Courts, though constituted Courts of Bankruptcy, do not possess the power under the twenty-fifth section of the Bankrupt Act to order, in a summary way, the sale of an estate, real or personal, although the same is claimed by the assignee, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual possession of a third person, holding the same as owner, and claiming absolute title to and dominion over the same as his own property, whether derived from the debtor before he was adjudged bankrupt or from some former owner. (*Knight* v. *Cheney*, 5 N. B. R., 305.)

Courts of Bankruptcy may exercise many of the powers conferred by the first section of the Bankrupt Act in a summary way, as well in vacation as in term time, first giving notice to the party opposed in interest to the prayer of the petition, as in a rule to show cause in an action at law or in a suit in equity without service of process, the rule being that in such a proceeding neither party is entitled to a trial by jury, and that the only remedy for error is to seek a review under the first clause of the second section of the same act. (*Smith* v. *Mason*, 6 N. B. R., 1, 14 Wall., 419.)

Power to revise cases and questions which arise in the District Courts in such proceedings is conferred upon the Circuit Courts by that clause of Section 2; but it is settled law that the power so conferred does not extend to any case where special

provision for the revision of the case is otherwise made. (*Morgan* v. *Thornhill*, 5 N. B. R., 1; 11 Wall., 65.)

Two trust deeds were executed by the debtor of the complainant in his lifetime—one to each of the two trustees named in the bill of complaint: the first embracing several tracts of land which were conveyed to secure his creditors, and the second consisting of an interest in a tract of two hundred acres arising from a verbal contract to purchase the same and an advance of seven thousand dollars in part payment of the stipulated consideration, in respect to which the party who agreed to purchase the same, not being able to pay the balance, determined to abandon the contract and assert a lien upon the tract for the amount paid.

Twenty-nine hundred dollars of the amount paid for the tract by the debtor was the money of his wife, which she derived from the estate of her father, and which, by agreement between her and her husband, made while the money was still in the hands of the executor, he was allowed to apply towards paying for the land, the stipulation between them being that in taking title to the land such an interest in the same should be conveyed to her in her own separate right as would be proportionate to the amount of her money applied to the payment of the consideration.

Abundant evidence to substantiate those facts is found in the record; and it also appears that the debtor of the complainant, on the tenth of June, 1867, conveyed to his son all of his equitable interest in the several properties previously transferred to the before-mentioned parties, together with whatever interest he owned in the turnpike therein described, which was not included in either of said trust deeds. Proof of that conveyance is placed beyond doubt, but it is equally clear that the chief object of the same was to secure the repayment to his mother of the money belonging to her which the father used and applied towards paying for the prior-described tract of land, the son becoming bound to her for that amount under the agreement.

Eight months and a half later, to wit: on the twenty-eighth

of February, 1868, the said debtor of the complainant filed his petition in bankruptcy, and in the month of February of the succeeding year received his discharge. On the sixth of May next, after the petition in bankruptcy was filed, the assignee of the estate was appointed and due conveyance of all the assets of the bankrupt was made to him, as required by law. Schedules of the bankrupt's liabilities were duly filed, but they did not mention the name of the original complainant as a creditor.

Allegations to the effect that the complainant proved debts to the amount of four thousand five hundred dollars are contained in the bill of complaint, and the record shows that his own deposition given in the cause affirms the allegation, but the answer of the respondents denies the fact alleged, and the deposition of the bankrupt fully supports the averment of the answer.

Service was made, and the respondents appeared and demurred to the bill of complaint, and they subsequently filed an answer setting up several defences, including most or all of the causes shown in support of the demurrer. Hearing was had, and the court, the district judge presiding, overruled the demurrer to the bill of complaint. Proofs were subsequently taken, and the parties having been again heard, the court, the circuit justice presiding, entered the final decree as to the merits in favor of the complainant, from which the respondents appealed.

Since the suit was commenced new parties have been made, in consequence of the death of the complainant and the principal respondent, but the questions to be decided are unaffected by that circumstance.

Three of the errors assigned were fully discussed at the bar. They are as follows: (1) That the court erred in holding that the conveyances made by the assignee to the complainant included any of the property sued for in the bill of complaint. (2) That the court erred in holding that the said conveyance was of any validity, even if it did include the property for which the suit is brought. (3) That the court erred in overruling the defence that the suit is barred by the statute of limitations.

These several assignments of error were discussed at the bar, in the order herein stated; but it will be more convenient to consider the question of limitation first, for the reason that if that is sustained, the other assignments of error will become immaterial, as sufficiently appears from the prayers of the bill of complaint, of which the following are the most material: 1. That the conveyance from the bankrupt to his son may be decreed to be fraudulent, null, and void. 2. That the equities and personal property therein described may be decreed to the complainant. 3. That if the court should be of the opinion that he, the complainant, is not entitled to all of the equities described, then that his *pro rata* in the same may be decreed to him, and that the four thousand dollars paid by the son, if found to have been paid out of his own money, may be decreed to have been paid in fraud, and with notice that he is not entitled to recover the amount. 4. That all debts included in the deed of trust may be decreed to be invalid as a lien on the estate of the bankrupt, and that all claims against the bankrupt which are unproven, whether secured or not, may be decreed invalid as to the estate of the bankrupt, and are not entitled to be paid out of the same, in whole or in part. 5. That the cloud caused upon the titles by the conveyance to the son may be removed, and that the titles to the tracts may be decreed to the complainant, free from the liens created by the conveyance.

Actions at law, or suits in equity, may, in a proper case, be brought by the assignee against any person to recover interests of the bankrupt held adversely, or by any person, against such assignee, touching any property vested in such assignee; but the same section of the Bankrupt Act provides that no suit at law or in equity shall, in any case, be maintained by or against such assignee, or by or against such person, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee. (14 Stat. at Large, 518; Rev. Stats., Sec. 5057.)

Deeds of trust, as before explained, were executed to certain trustees, and on the 10th of June, 1867, the equities in controversy were conveyed by the debtor to the son. On the

28th of February of the next year the debtor filed his petition in bankruptcy. Due proceedings followed, and on the 6th of May, 1868, more than two years before the bill was filed, the assignee was appointed and conveyance was duly made to him of all the assets of the bankrupt.

Speedy administration as well as equal distribution of the assets among the creditors is the policy of the Bankrupt Act, and the former is almost as necessary as the latter to accomplish the beneficent ends for which the law was passed. Impressed with that view, Congress enacted the limitations contained in the second section of the Bankrupt Act, which, like other statutes of limitation, must receive a reasonable construction. Beyond doubt it applies to all judicial contests between the assignee and other persons touching the property or right of property of the bankrupt transferable to or vested in the assignee, where the interests are adverse and have so existed for more than two years from the time when the cause of action accrued for or against the assignee. (*Bailey* v. *Glover*, 12 N. B. R., 24, 21 Wall., 342.)

Absolute title to the equities in controversy was claimed by the respondent from the moment the deed to him of the same was executed by the bankrupt, and if that conveyance was made in fraud of creditors, as alleged by the complainant, it is clear that the equities were transferred to and vested in the assignee when he was appointed, and of course his right of action to recover the same commenced at the time the instrument of assignment was executed and delivered. Whatever remedy for the supposed fraud the assignee had, it is evident he might have pursued and enforced at any time after he acquired title to the bankrupt's estate. (*Ex parte* Currie, 7 Law Times, N. S., 486; *Cleveland* v. *Boerum*, 24 N. Y., 613.)

Ignorance of the state of the title is not alleged, nor is there any pretence of concealment. Instead of that, the proof is clear that the assignee knew all the facts, and that he came to the conclusion that the title of the respondent was valid, and that the assignee had no just claim to the equities. (*Terry* v. *Anderson*, 5 Otto, 628; *Clark* v. *Hackett*, 1 Cliff., 269.)

Nor is there anything to benefit the complainant in the suggestion that he does not sue as assignee or creditor, as the record clearly shows that he claims as purchaser from and under the assignee.

Pending the proceedings in bankruptcy, the assignee petitioned the court for authority to make sale of the notes, judgments, and accounts of the bankrupt for the reasons set forth in the petition, not including the equities which the bankrupt had previously conveyed to his son. Enough appears to show that the reason he did not include those equities in the petition was that he had reported to the court the day previous that the conveyance to the son was without fraud and valid. Reasonable doubt upon that subject cannot be entertained, but the order entered by the court upon the petition is broader than the prayer of the petition, and includes the interest of the bankrupt in the property conveyed to "the son and all other property belonging to the estate." Pursuant to that order, dated May 17, 1871, the assignee, on the 13th of June following, sold all the assets of the bankrupt for the sum of two hundred and twenty-five dollars to the complainant, he being the highest bidder for the same at the public sale.

Nothing can be plainer in legal decision than the proposition that the complainant did not acquire, by the conveyance made to him under that sale, any greater rights than those possessed by the grantor. Whatever rights the assignee possessed, if any, were acquired May 6th, 1868, when he was appointed and qualified as the assignee of the estate of the bankrupt. Throughout the whole period intervening between that date and the date of the purchase by the complainant, the respondent held the equities in controversy adversely to the supposed right of the assignee.

Viewed in the light of these suggestions, it is clear that the right, if any, of the assignee was barred by the statute of limitations before purchase of the same by the complainant.

Decree reversed with costs, and the cause remanded with directions to dismiss the bill of complainant.

UNITED STATES DISTRICT COURT—MASSACHUSETTS

DECEMBER 7, 1878.

Where the creditors have full knowledge of all the facts, and the debtor, who is doubtful of obtaining his discharge or who wishes to proceed at once with his business, as a fair compromise of possible litigation, induces his friends to pay more in composition than his estate could pay in bankruptcy, *Held*, That the composition stands well before the court.

Where a creditor considers himself and is considered by the debtor to be fully secured, although in fact he is not, he is not to be counted as a creditor merely to defeat a composition to which the requisite number of creditors have assented.

## *In re HOWARD SNELLING.*

THE facts sufficiently appear in the opinion.

*S. Hoar*, for the bankrupt.
*G. H. Miller*, for objecting creditors.

LOWELL, J.—The objections to the composition are founded upon a very large payment made by the bankrupt to his brother about three weeks before his first note was protested. It is urged that if all this money can be recovered, there will be a dividend larger than the offered composition.

In support of the settlement it is maintained that a considerable part of the alleged preference cannot under any circumstances be recovered by an assignee; because, as to one portion, the brother had a valid mortgage which he surrendered; and as to another portion, it consists of notes indorsed by the brother and paid to the banks as they came due in the ordinary course of business, without any arrangement or contrivance between the bankrupt and his brother, and that whatever may have been the motive of the debtor, there is no circumstance upon which the brother can be charged as a preferred creditor. And, lastly, that the whole matter of the supposed preference was fully understood by the creditors and acted upon by them, and in consideration thereof they required a larger offer than the apparent assets would warrant; that this demand was acceded to

by the debtor and by his brother, who indorses his composition notes; and that by this guarantee the brother in fact restores to the creditors more than an assignee could recover of him; and whether so or not, the creditors have passed upon this as well as upon other questions, and their wishes should be respected.

The composition offered is plainly more than the debtor can pay from his own resources. I have seen an English case in which this fact was considered a sufficient proof of fraud. That case must have had in it some exceptional circumstances. In my opinion one of the advantages of the law of composition, and one which compensates to a certain extent some decided objections, is, that a debtor who is doubtful of obtaining his discharge, or who wishes to proceed at once with his business, may induce his friends to pay more in composition than his estate could possibly pay in bankruptcy. When such a result has been reached with a full knowledge by the creditors of all the facts, and as a fair compromise of possible litigation, I agree with the debtor's counsel that the composition stands well before the court.

I consider this to be a fair and even liberal offer, and that the resolutions on their merits should be recorded.

A preliminary point was argued and an opinion intimated upon it at the hearing. The unsecured creditors are twenty-four in number, and precisely two-thirds of this number, representing a very large excess of value, have signed the confirmation. The objecting creditors maintained that two secured creditors were not fully secured, and therefore should be counted for some amount to be hereafter ascertained, and, if counted at all, the number of signers is insufficient. It turned out that those two creditors consider themselves to be fully secured and are so considered by the debtor, and that they are ready to file a renunciation of all claim beyond their security. Under these circumstances I do not think that the objecting creditors should be at liberty to set up the *jus tertii*, if I may so express it.

Granting, as is granted by the objecting creditors, that there

is no fraud in the matter, but only an honest difference of opinion concerning values, I do not see any propriety in counting one as a creditor who expressly disclaims that character. There is no justice in forcing a creditor upon the bankrupt against the will of both parties, merely to defeat a composition to which the requisite number of acknowledged creditors have assented.

Resolutions to be recorded.

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UNITED STATES DISTRICT COURT—W. D. TENNESSEE.

The loss of proofs of debt which have been filed is the misfortune of the bankrupt, and he cannot be legally discharged until they are supplied.

A creditor who has proved his debt is entitled to notice by *mail* of an application for a discharge, and he cannot be prejudiced by the loss of his proof from the files.

Where proofs of debts have been lost, a general notice of the meeting under the petition for discharge to all creditors named in the schedule, stating that if they have theretofore filed proof of debt, it will be necessary for them to supply it as it has been lost, is not sufficient. Such lost records must be supplied under Sections 899, 900, R. S.

## *In re FRIEDLOB.*

THE facts are stated in the points submitted by the register, which follow:

On the 22d day of May, 1878, the creditors elected an assignee in said matter, to whom was delivered the proof of debts on file at that date. These, together with such as have come to his hands since his appointment, are so mislaid that he cannot find them, nor his book in which the same are entered. The only record to be had of the proven debts is that of those in hands of the undersigned, which is only partial. I may add that the number of debts proved is small, and the assignee reports no assets whatever.

The bankrupt has filed his petition for discharge. Under Section 5109 no creditors are required to be notified of the day to show cause, except such as have proved their debts; but in

the case now certified, not having a perfect list, I am unable to know whom to notify. This difficulty, however, could be only obviated by giving notice to all the creditors in the schedule. But this would not remove another serious defect in the proceedings; the creditors who had previously filed their debts, on receiving the notice, unless they desired to oppose the discharge for cause, would conclude it unnecessary to give the matter further attention.

It is useless to point out the inconsistent result that would follow. I respectfully recommend the following course: At the bottom of the usual notice of the meeting under the petition for discharge let the following note be added: "If you have heretofore filed your proof of debt in this case, it will be necessary for you to supply it, as the same has been lost." And let these notices be sent to all the creditors named in the schedule.

I would further suggest that the time under these notices be five days longer than usual, viz.: fifteen days.

Respectfully submitted,
T. J. LATHAM, Register.

HAMMOND, J.—The course suggested by the register will not answer the purpose. It goes on the assumption that all the creditors of the bankrupt are, as a matter of fact, mentioned in his schedules, and notice to them will be notice by mail to all "who have proved their debts," as the statute requires. (Rev. Statutes, 5109.)

Now it is possible that the bankrupt may have left off his schedules the name of some one or more of his creditors by misadventure, or, it may be, designedly in the case of some creditor known to be hostile; and as some creditors of this kind may have proved their debts, under the plan above suggested, they would receive no notice by mail. The Statute (5109) provides for a publication of a notice of any application for discharge, which seems designed to protect the creditors against a discharge without notice; but this kind of notice will not bind a creditor who has proved his debt, nor can he be prejudiced

by the loss of his proof from the files. Having proved his debt, he is entitled to notice by mail. The loss of these papers is the bankrupt's misfortune, and until they are supplied he can no more be legally discharged than he could be if other material points, or the whole of the record, were lost. Lost records are supplied in this court under the provisions of the Revised Statutes, secs. 899, 900.

That the proofs of debt are a part of the record there can be no doubt. (*In re* Emison, 2 N. B. R., 595; *In re* Anon., 1 N. B. R., 219.)

The clerk will certify this opinion to the register.

## COURT OF APPEALS—NEW YORK.

FEBRUARY 5, 1878.

An assignee in bankruptcy has a right of action to set aside a fraudulent conveyance made by the bankrupt, although none of the creditors have acquired a specific lien.

An agreement between the parties to a chattel mortgage, outside of the mortgage, by which the mortgagor is allowed to continue dealing in the mortgaged property and to use the avails for his support and business, and to pay to the mortgagees such sums as he can spare from his general business, will invalidate the mortgage.

*CHARLES C. SOUTHARD, Assignee of WILLIAM H. DECKER, respondent,* v. *HIRAM BENNER et al., appellants.*

APPEAL from judgment of the General Term of the Court of Common Pleas, in and for the city and county of New York.

This action was brought by plaintiff, as assignee in bankruptcy of William H. Decker, to recover the proceeds of the sale of a quantity of lumber, the property of the bankrupt, alleged to have been made by defendants, claiming to act under a chattel mortgage, executed to them by the bankrupt, upon his stock of lumber, which mortgage plaintiff alleged to be fraudulent and void, in that, by the understanding of the

parties, the mortgagor continued in the business of selling lumber from said stock, using the proceeds in his business.

Defendants justified under their mortgage, which, upon its face, was given to secure the payment of the sum of thirty thousand dollars. They also alleged that the proceeds of any of the stock sold by the mortgagor were intended to be and were applied upon a prior mortgage of twenty-five thousand dollars executed by him; also, that the holders of the prior mortgage claimed the proceeds of the sale made by the defendants, and had brought action against them therefor.

The facts appear sufficiently in the opinion.

*Samuel Hand*, for appellants.

An assignee in bankruptcy has no greater right than his assignor to attack a chattel mortgage, except in behalf of creditors or purchasers having title to or a lien upon the property by judgment, transfer, or otherwise. (*In re* Collins, 12 N. B. R., 379, 12 Blatch., 548.) In the case of a fraudulent incumbrance upon personal property, a general debt will not authorize a proceeding to vacate it. (12 Blatch., 552; *Frisby* v. *Thayer*, 25 Wend., 396; *Tiffany* v. *Warren*, 37 Barb., 571; *Geery* v. *Geery*, 63 N. Y., 252; *Gibson* v. *Warden*, 14 Wall., 244.) The fact that the mortgagor was allowed to continue the sale of the goods covered by the mortgage did not make it fraudulent in law. (*Ford* v. *Williams*, 24 N. Y., 359; *Frost* v. *Warner*, 42 id., 204.)

*R. E. Deyo*, for respondent.

The mortgage being upon a stock in trade sold and replenished from day to day, by permission of the mortgagee, and the proceeds being appropriated by the mortgagor, with consent of the mortgagee, was fraudulent in law. (*Frost* v. *Warner*, 42 N. Y., 204; *Gardner* v. *McEwen*, 19 id., 123; *Ford* v. *Williams*, 24 id., 359; *Conkling* v. *Shelly*, 28 id., 360; *Miller* v. *Lockwood*, 32 id., 293; *Chatham Nat. Bk.* v. *O'Brien*, 6 Hun, 231.)

ALLEN, J.—A creditor at large cannot assail an assignment or other transfer of property by the debtor as fraudulent against creditors, but must first establish his debt by the judgment of a court of competent jurisdiction, and either acquire a lien upon the specific property or be in a situation to perfect a lien thereon, and subject it to the payment of his judgment upon the removal of the obstacle presented by the fraudulent assignment or transfer.

Every assignment or conveyance of property with intent to hinder, delay, or defraud creditors, is void as against creditors, not only at common law but by statute, and every conveyance or transfer of chattels not followed by an actual and continued change of possession is presumed to be fraudulent as against creditors, and such want of change of possession is conclusive evidence of fraud, unless it be shown that the same was not made with intent to defraud. The term "creditors," as used in the statute, includes all persons who are creditors of the vendor or assignor at any time whilst the goods remain in his possession or under his control. (2 R. S., 136, Secs. 5, 6.) A creditor by simple contract is within the protection of the statute as much as a creditor by judgment, but until he has a judgment and a lien, or a right to a lien upon the specific property, he is not in a condition to assert his rights by action as a creditor. (*Geery* v. *Geery*, 63 N. Y., 252; *Frisby* v. *Thayer*, 25 Wend., 396.) The plaintiff, as assignee in bankruptcy, represents the whole body of creditors, and may, in their behalf, impeach a conveyance of property by the bankrupt as fraudulent whenever the creditors might or could by any process acquire the right to contest its validity.

By the statutes of this State (Laws of 1858, Ch. 314) any executor, administrator, assignee, or other trustee of an estate, or the property and effects of an individual, may, for the benefit of creditors or others interested in the estate or property so held in trust, disaffirm and treat as void all transfers in fraud of the rights of any creditor, or others interested, and maintain all necessary actions for that purpose. This act, conferring special authority for the benefit of creditors, dispenses with the

necessity of any special or other lien in behalf of individual creditors. The act is not for the enforcement of specific liens for the benefit of individual creditors. No statute was necessary for that purpose, as each creditor having such lien could vindicate his rights under the law as before administered. This act gave a new remedy in favor of creditors at large, by giving to an assignee or trustee for their benefit a statutory right to property conveyed in fraud of creditors, and this statutory right took the place of the specific lien of individual creditors required by law as a condition of their right to contest the validity of the transfers. The Bankrupt Law of the United States, in express terms, vests in the assignee all property conveyed by the bankrupt in fraud of creditors, and thus gives him a title to all property so conveyed, and supersedes the necessity of a judgment and execution in favor of any or all the individual creditors. (Bankrupt Act, Sec. 14; R. S. of U. S., Sec. 5046.) The policy of the Bankrupt Law is to secure an equal distribution of all the property of the bankrupt among his creditors; and this object would be defeated if a fraudulent assignor could set the fraudulent assignee at defiance, and a fraudulent conveyance not be contested by the assignee. Creditors could not well do it after a decree in bankruptcy; they would be practically remediless. The Bankrupt Court would be a place of refuge for every debtor who had fraudulently disposed of his property, and the Bankrupt Act a perfect shield for fraud. The assignee represents the creditor's rights without the technical obstructions to the enforcement of those rights by a creditor at large. It was held by the late Judge Hall, of the North ern District of New York, that the assignee represented the whole body of creditors, and that it was his right and duty to contest the validity of any mortgage by which one creditor had obtained a preference over another. (*In re* Metzger, 2 N. B. R., 355.)

The same principle was asserted by Chief-Justice Chase in the Circuit Court of Virginia in *Wynne's Case* (4 N. B. R., 23), and by Judge Curtis in *Carr* v. *Hilton* (1 Curt., 230). The latter judge says: "A fraudulent conveyance is no effec-

tual conveyance as against the interest to be defrauded. This interest the assignee represents, so far as respects all creditors who prove their claims."

In *Collins' Case* (12 N. B. R., 379, 12 Blatch., 548) fraud was not alleged. The validity of the chattel mortgage was contested upon the sole ground that it had not been filed as required by law, and Judge Hunt held that within the terms of the act none but creditors who had by judgment and execution obtained a specific lien on the thing mortgaged, or subsequent purchasers or mortgagees in good faith, could attack the mortgage for the reason alleged, and that the assignee was not within the benefits of the statute. The reasoning of the learned judge, it must be conceded, would apply to a mortgage alleged to be fraudulent in fact, but, in following it as an authority, we think the principle should not be extended so as to prove a shield to actual fraud. The non-compliance with a statute, merely imposing a new condition to the validity of chattel mortgages for the protection of the particular classes mentioned, and not involving the question of fraud or fraudulent intent, may well be restricted in its operation to the individuals for whose immediate protection it was passed. Upon sound reason and the policy of the law, as well as the authorities quoted and others that might be referred to, there can be no doubt, we think, that the plaintiff as assignee has a right of action for property conveyed by the bankrupt in fraud of his creditors, although none of the creditors have acquired a specific lien. It is not such liens, or any particular interest in the property, or an interest for the benefit of any one creditor or class of creditors, that is vested in the assignee, but the entire property fraudulently transferred, and for the benefit of all the creditors. The assignee takes title not under any claim of right existing in the creditors, but under the statute, and that right he may assert by action, although no individual creditor, or all the creditors combined, could have a standing in court to challenge the conveyance. The case was not submitted to the jury upon the presumption of fraud arising from the want of a change in the possession. There was no such

change, and the presumption by statute was that the mortgage was fraudulent and void for that reason, and such presumption was conclusive unless the defendants satisfied the jury, by evidence, that it was not made with intent to defraud, and such would have been the proper instruction to the jury if that had been the only circumstance relied upon to impeach the transfer. (2 R. S., 136, Sec. 5.) Evidence was given that, from the time of making the mortgage to the defendants, the mortgagor continued to deal with the mortgaged property, consisting chiefly of lumber, in which he was a dealer, as he had been accustomed to do, buying and selling as opportunity offered, and using the proceeds of his sales to meet his liabilities and in the prosecution of his business in all respects as if no mortgage was in existence; and there was evidence tending to prove that the business was thus carried on and the mortgaged property dealt with and sold by the permission of the defendants. This, with the other facts, of which there was also evidence, that the defendants had, from the time of making the mortgage, for several months thereafter employed a Mr. Brown in and about the business of the lumber-yard of the mortgagor, acting with and under him, to look after their interests, and that the mortgages were made to secure advances to enable the mortgagor to continue his business, made it a question for the jury whether this continued dealing with, and sales of, the mortgaged lumber was not in pursuance of an arrangement between the parties, cotemporaneous with the giving of the mortgage, that the mortgagor should continue his dealings with and sales of lumber as before, notwithstanding the mortgage. That question was submitted to the jury, and they have found the arrangement as suggested. The instruction to the jury, upon which the case hinged, as explained and qualified upon a recalling of the jury for such explanation, and to avoid a misapprehension, was, that if they found that it was the understanding of these parties at the time the mortgage was made that Mr. Decker, the mortgagor, was to go on and sell part of this stock and use the money generally in his business, that was fraudulent in law. The charge was equally explicit that

unless they found such to have been the understanding, and if the sales had in fact been made without the knowledge or assent of the defendants, they would be entitled to a verdict. There was no error in charging the jury that the understanding referred to might be inferred if the defendant had permitted the sales to be made as alleged. It is the province of the jury to make all necessary inferences from the facts proved, and the existence of the arrangement and understanding was a material and necessary inference from the undisputed facts. The question then is, did the arrangement, if made as alleged and carried out by the permitted sales of, and dealing with, the mortgaged property, necessarily invalidate the mortgage? Did it conclusively prove that the mortgage was fraudulent in law; that is, so conclusively establish the fraud that a verdict of the jury to the contrary would have been set aside as against evidence? Such an arrangement is incompatible with a mortgage designed only as security to the mortgagee. The dealing with the mortgaged property as a merchandise by the mortgagor, and the sale of the same in the ordinary course of business as a merchant, with the consent of the mortgagee, necessarily destroys the value of the mortgage as a security, and makes it only available, if for any purpose, so long as this arrangement and dealing continues, to protect the property from creditors and secure it to the mortgagor. Such a transaction is necessarily fraudulent. It hinders and delays other creditors, without securing the application of the property or its avails to the payment of the mortgage debt. In *Frost* v. *Warner* (42 N. Y., 204) it was held that the fact that the mortgagor continued to sell the mortgaged property, consisting of goods in a store, with the knowledge of the mortgagee, in the absence of proof that this was pursuant to an agreement between the parties, did not render the mortgage fraudulent in law as against other creditors, clearly implying that such an agreement, and a selling of the goods in pursuance of it, would constitute fraud in law—that is, be conclusive evidence of fraud. Here the jury have found the agreement upon evidence that could warrant no other conclusion.

Advances made to enable the mortgagor to continue his business as a dealer in lumber, the entire stock of the dealer mortgaged to secure the advances, an agent of the mortgagees designated and appointed to supervise the business and watch their interests, sales continued by the mortgagor as before, and the avails used by him for his support, and as his wants and business calls demanded, and this continued for a full year, the mortgagee receiving not the avails of the mortgaged lumber, but such moneys as the mortgagor could spare from the general business, all point to but one conclusion, that this was in pursuance of an agreement between the parties cotemporaneous with the mortgage. Such an arrangement included in and making a part of the written instrument of mortgage would clearly invalidate it as fraudulent in law, as that term is understood; that is, would be conclusive evidence of fraud in fact, and would be so held by the court as matter of law. This was decided in *Edgell* v. *Hart*. (5 Seld., 213.) Whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference in principle. Its effect as characterizing the transaction would be the same. The difference in the modes of proving the agreement cannot take the sting out of the fact and render it harmless. If it is satisfactorily established, the result upon the security must be the same. It is the fact that such an agreement has been made and acted upon that in law condemns the security, and not the fact that it is proved by the instrument of suretyship, instead of by parol or in some other way. This question is considered by Judge Denio in *Gardner* v. *McEwen* (19 N. Y., 123), and by Judges Grover and Woodruff in *Russell* v. *Winne* (37 N. Y., 591), and although not expressly decided in either case, it is very conclusively shown by the reasoning of those learned judges that an agreement by which the mortgagee is permitted to deal with the mortgaged property, outside of the mortgage, and proved by parol, is equally fatal to the security as if made a part of the written mortgage.

The judge presiding at the trial of this action adopted the principle adjudged in *Edgell* v. *Hart*, and applied it to an

agreement proved by evidence *aliunde* the mortgage in accordance with the views of the judges named. We are of the opinion that the correct rule was applied, and that there was no error of which the defendants can complain in the submission of the case to the jury. There was no justification under the twenty-five thousand dollar mortgage, the defendants claiming that if not fully paid it was not a valid lien as against them. Their defence was under the thirty thousand dollar mortgage, and the jury, therefore, were properly told that the former mortgage had nothing to do with the case. The plaintiff made no claim under it, and the defendants did not justify under it. It was properly withdrawn from the consideration of the jury.

The judgment must be affirmed.

All concur, except *Andrews, J.*, absent.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

APRIL 23, 1879.

**The bankrupt was a stock and gold broker, but was not a member of the Stock Exchange. He took orders for the purchase and sale of stocks and gold, but conducted the business exclusively through the agency of other brokers who were members of the Exchange, and divided the commissions with them. *Held*, That he was not a merchant or tradesman within the meaning of the act, and as such disentitled to a discharge for failure to keep books of account.**

## *In re EDGAR W. MOSS.*

THE facts appear fully in the opinion.

*B. Skaats*, for bankrupt.

*Chas. E. Crowell*, for opposing creditor.

CHOATE, J.—This is an application for the discharge of the bankrupt. The only specification is that, being a "merchant or tradesman," he kept no books of account. The bankrupt

kept no books. The only question is, was he a "tradesman" within the meaning of the act? The evidence as to the nature of the bankrupt's business is very confused; but, as nearly as it can be made out from his examination, it was as follows: he was a stock and gold broker, but without being a member of the Stock Exchange; he took orders for the purchase and sale of stock and gold, but did not himself execute the orders; he opened accounts in his own name as "agent" with other brokers who were members of the Exchange, and they bought and sold for him upon his orders, and gave him half the commission usual in such transactions; he furnished those for whom he did the business a memorandum of each transaction immediately after it occurred. It did not appear whether his customers knew that he bought and sold exclusively through other brokers, nor was there any evidence of concealment. The debts contracted by him consisted chiefly of balances due the brokers through whom he acted, being in reality for excess of his losses over the margins deposited. There were also some debts for borrowed money, and some debts due to the customers who employed him, for balances on these stock transactions. Upon these facts I think it clear that the bankrupt was not a "merchant or tradesman" within the meaning of the act, and as such disentitled to a discharge for failure to keep books of account. The careful discussion of the meaning of the word "tradesman" in recent cases makes it unnecessary to do more than refer to those authorities. (*In re* Coté, 14 N. B. R., 503; *In re* Stickney, 17 id., 305; *In re* Marston, 5 Ben., 313.)

Discharge granted.

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## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

FEBRUARY 5, 1879.

**An action of claim and delivery of goods and chattels under the New York Code brought against a bankrupt must be stayed pending the question of his discharge so far as the action is one for the recovery of a money judgment for the value of the goods.**

In re Cohen.

One W., in 1876, sold certain goods to the bankrupt, and in 1878 commenced an action of claim and delivery against him to recover the goods or their value. Upon the certificate of the sheriff that the goods had been concealed, removed, or disposed of, and upon affidavits setting forth that defendant had obtained the goods on credit by means of false representations as to his pecuniary circumstances and condition, and that said representations were made with intent to obtain the goods thereby and not to pay therefor, an order of arrest was granted. The bankrupt, who had been adjudicated prior to the commencement of the action, thereupon procured an order staying proceedings under the order of arrest and all proceedings in the action for the recovery of a money judgment for the value of the goods. On motion to vacate this order, *Held*, That the stay was properly granted.

## *In re MARKS COHEN.*

THE facts appear fully in the opinion.

*A. J. Simpson*, for plantiff.
*D. Leventritt*, for bankrupt.

CHOATE, J.—This is a motion to vacate an order staying the proceedings of one Werner in an action against the bankrupt.

The petition in bankruptcy was filed December 21, 1876, and the bankrupt was adjudicated September 12, 1878. In November, 1878, Werner commenced against the bankrupt an action of claim and delivery, as it is called by the New York Code, ostensibly, and so far as appears by the complaint, to recover certain goods and chattels. It is the substitute for the action of replevin. In this action, if it appears by the certificate of the sheriff that the goods sought to be replevied have been eloigned, concealed, removed, or disposed of, so that he cannot take the same, the plaintiff can proceed with his action and recover a money judgment for their value. And upon proof by affidavit of these facts, and that such concealment or disposition of the goods was with intent that they should not be found or taken, or to deprive the plaintiff of the benefit thereof, he can procure an order of arrest against the defendant, and he will be held to bail, the condition of the bail bond being "that the defendant will deliver the goods to the plaintiff, if delivery thereof is adjudged in the action, and will pay any sum recovered against him in the action." (Code Civ. Proc., Sec. 575.) The sheriff having made the necessary certificate, the plaintiff

procured the order of arrest, and at this stage of the case the bankrupt obtained the order of this court staying proceedings under the order of arrest and all proceedings in the action for the recovery of a money judgment for the value of the goods. The affidavits on which the order of arrest was procured are to the effect that in September, 1876, the defendant, to induce the plaintiff to sell and deliver to him on credit the goods in question, falsely represented to the plaintiff his pecuniary circumstances and condition, and thereby induced the plaintiff to part with the goods, and that these false representations were made with intent on defendant's part to obtain the goods thereby and not to pay therefor.

It is now insisted on the part of the plaintiff that this court has no power to grant a stay of a suit of replevin or of any proceedings or remedies given to the plaintiff therein. It is obvious, however, that this particular form of action is in reality a proceeding to obtain alternative judgments or relief: *first*, if the goods are found, the goods themselves; and, *secondly*, if they cannot be found, in which case the action of replevin, strictly speaking, must utterly fail, a money judgment for their value. It is the combination in a single action of an action of replevin and an action of trover, and the arrest is clearly given as a provisional remedy in aid of this proceeding to recover the value of the goods alleged to have been disposed of. A claim for the conversion of goods and chattels is expressly enumerated among the debts that may be proved against the bankrupt (Section 5067), and suits to recover all provable debts are by Section 5106 to be stayed pending the question of the bankrupt's discharge. Even if such a debt was created by fraud and will not be discharged, proceedings therein, including arrest on mesne process, will be stayed pending the question of the bankrupt's discharge. (*In re* Rosenberg, 2 N. B. R., 236; *In re* Schwartz, 15 id., 330.) Therefore, so far as the action is an action for conversion it must be stayed. The Bankrupt Law deals with proceedings against bankrupts, not according to their form merely, but according to their real character. (*In re* Schwartz, *supra*.) Otherwise, by ingenuity in framing a

complaint, or by legislation as to the form of actions, the obvious purposes of the Bankrupt Law could be defeated. To allow the action to go on would be to allow the bankrupt, pending the question of his discharge, to be sued for the recovery of a provable debt, and to permit one creditor to have an advantage over all others by forcing the bankrupt to give him security for his claim. The stay was properly granted. In this particular case it is very plain that the form of action was adopted in order to avoid the difficulties which the Bankrupt Law interposes to the plaintiff's proceeding in any other form of action for the value of the goods. Two years and a half after selling goods to the bankrupt the vendor claims the right to disaffirm the sale and rescind the contract for fraud on the part of the bankrupt. The goods were merchantable articles, evidently, from their description, sold to the bankrupt to be sold again by him in his business. It is too plain that the form of action for replevin is resorted to thus after the bankruptcy, not with the expectation of replevying the goods, but for the alternative remedy for their value which that form of action permits, and upon the theory that actions of replevin not being enumerated among those that may be stayed, any remedy given in such form of action is saved to the creditor. While it is hardly possible that it can be seriously claimed that the right to avoid a sale and delivery for fraud can survive after so long a time, yet so far as this action is prosecuted against the bankrupt strictly as an action of replevin, it is not interfered with by the stay, and this is all that the creditor is entitled to ask of this court.

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## UNITED STATES DISTRICT COURT— S. D. NEW YORK.

FEBRUARY 14, 1879.

**Every District Court in the United States has jurisdiction and authority to make all lawful orders and decrees in bankruptcy, although the original petition in bankruptcy was filed in another district, provided that the relief asked is such as cannot be given by the District Court where the original petition was filed, because the persons or property sought to be affected**

by the order or decree are beyond the reach of its process, and that they are within the reach of the process of the District Court whose aid is invoked.

An order made in a composition proceeding appointing the bankrupts custodians of their property does not put them in the position of an assignee so that they can maintain a suit under Section 4979.

The complainants, who are residents of the State of Louisiana, filed a petition in bankruptcy in that district, and proposed a composition, which was accepted and confirmed, and the complainants appointed custodians of their property, and authorized to protect and collect the same for the purposes of the composition and for the benefit of their creditors. The names and address of the defendants, H. & Co., and the amount of the debt due to them, were entered in the schedule annexed to the petition for composition. Within four months prior to the commencement of the proceedings in bankruptcy, the defendants, H. & Co., who were residents of the State of New York, commenced an action against complainants by publication, and attached a debt due to them from M. & Co., also residents of New York, of a less amount than their claim, and subsequently recovered judgment in said action. In a suit brought to obtain an injunction against H. & Co. and the sheriff to restrain their proceedings on the judgment, and for an accounting and payment of the debt by M. & Co., *Held*, That complainants were not entitled to relief in injunction; that, as no assignee has been appointed, the lien of the attachment continues, and is preserved by the Bankrupt Law; and that while H. & Co. are bound by the composition as to their claims *in personam* against the complainants, their rights *in rem* against the property attached are not affected or impaired thereby.

## *SCOTT M'GEHEE et al.* v. *HENRY HENTZ et al.*

THE facts appear fully in the opinion.

*Wm. E. Sleger*, for complainants.
*Chambers, Boughton & Prentiss*, for Hentz & Co.

CHOATE, J.—This is a motion for an injunction in a bill in equity. The material facts are as follows: The complainants, McGehee, Snowden & Violette, were partners in business, residing and doing business at New Orleans, in the State of Louisiana, and on the 27th of May, 1878, they were adjudicated bankrupts, on their own petition, by the District Court for the district of Louisiana.

On the same day they filed their petition for a meeting of their creditors, to consider a composition proposed by them. The composition proposed was five cents in one year and ten cents in two years. Regular proceedings on the petition were had, which resulted in an order, made Nov. 23, 1878, confirm

ing the composition and directing it to be recorded. The defendants, Hentz, Eastwood and Seman, all of the city of New York, and partners composing the firm of Henry Hentz & Co., are creditors of the complainants, and the names and address and the amount of their debt, about nine hundred and thirty-six dollars, were entered in the schedule annexed to the petition for composition. Within four months before the filing of the petition in bankruptcy, Hentz & Co. commenced an action against the complainants in the Supreme Court of the State of New York, and procured an order of attachment therein, under which they attached a debt then due to the complainants from the firm of Macauley & Co., also residents of New York, the amount of said debt being six hundred and thirty dollars and fifty cents. In that action, the defendants being non-residents, service by publication was ordered, and judgment was entered in favor of the plaintiffs, Hentz & Co., by default, Oct. 11, 1878, and execution issued to the sheriff of New York for one thousand one hundred and fifteen dollars and twenty-six cents. On the 11th of October, 1878, on their own petition, the Bankrupt Court in Louisiana made an order appointing and confirming the bankrupts as custodians of all their assets, authorizing them to hold, protect, and collect the same for the purpose of the composition and for the benefit of their creditors. The bill is addressed to this court sitting in bankruptcy, and is brought against Hentz & Co. and the sheriff and Macauley & Co., praying an injunction against Hentz & Co. and the sheriff to prevent their further prosecution of their proceedings on the judgment against the attached property, and as against Macauley & Co. an accounting and payment of said debt due the bankrupts.

It is objected by the defendants that this court has no jurisdiction nor any authority to enjoin the enforcement of the judgment and execution; that the complainants' remedy, if any, is in the District Court of Louisiana, or, for the purpose of having the attachment dissolved, if entitled to that relief, in the State Court where the judgment was recovered. It seems to be settled, however, that every District Court in the United States

has jurisdiction and authority to make all lawful orders and decrees in bankruptcy, although the original petition in bankruptcy was filed in another district, provided that the relief asked is such as cannot be given by the District Court where the petition was originally filed, because the persons or property sought to be affected by the order or decree are beyond the reach of its process, and where they are within the reach of the process of the District Court whose aid is thus invoked. (*Shearman* v. *Bingham*, 7 N. B. R., 490; *Lathrop* v. *Drake*, 13 N. B. R., 472, 1 Otto, 516.) The case is therefore to be judged as if the original petition were filed in this district. Nor is there any doubt of the subject matter of the action being within the jurisdiction of the court in bankruptcy conferred by Revised Statutes, Section 4972. The suit relates to the ascertainment and liquidation of a lien claimed by a creditor upon the bankrupt's estate. It is a controversy relating to the adjustment of a claim of priority and conflicting interests between the bankrupt and a creditor, and relates to the disposition of the assets. The jurisdiction is clear enough under Section 4972, but I cannot accede to the argument of complainants' counsel that the order appointing the bankrupts custodians of their property puts them in the position of an assignee, so that they can maintain a suit in the District or Circuit Court under Section 4979. That section relates to suits by and against assignees only. The order appointing the bankrupts custodians of the assets seems not to be provided for in the Bankrupt Law. If it has any force, it may be to give them the powers of special receivers; but even then they are not within the provisions of Section 4979. The jurisdiction in this case being in a proceeding in bankruptcy, the court has power to enjoin interference with the property of the bankrupts, if a proper case for relief is made out. Revised Statutes, Section 720, does not prohibit such an injunction.

Even if the application should have been by petition instead of bill, the bill may be treated as a petition if the complainant is entitled to relief.

On the merits, however, I think the complainants are not

entitled to relief on injunction. The attachment which Hentz & Co. procured was, at the commencement of the bankruptcy proceedings, a lien on the property against which they are now proceeding by execution. Being within four months of the filing of the petition, it was liable to be dissolved if the case in bankruptcy had proceeded in due course to the appointment of an assignee; but, unless an assignee is so appointed, the lien continues, and is preserved by the Bankrupt Law. (*In re* Clapp, 14 N. B. R., 191; *In re* Irons, 18 N. B. R., 95.) The cases cited to the contrary in the State Courts have not received the approval of the Federal Courts. (*Miller* v. *Mackenzie*, 13 N. B. R., 496; *Smith* v. *Engel* 14 N. B. R., 481.) Now, in the present case, if the appointment of an assignee were in the due course of the proceedings to be anticipated, the creditor having the voidable attachment would, doubtless, pending the question of such appointment, be restrained from enforcing his lien. But, in the present case, the bankrupts and the creditors have elected, as they have a right to do, an entirely different mode of dealing with the bankrupts' estate, and one which excludes the appointment of an assignee. Even without the order of the court making the bankrupts custodians, the proper meaning of the composition agreement is that the bankrupt is left in the possession and control of his property. The bankrupts certainly are bound by the election thus made by them and by the terms of the composition; both they and their creditors have virtually agreed that the bankrupts should retain their property subject to all existing liens. It is suggested that the resolutions of composition may yet be amended by providing for the appointment of an assignee to take and hold the assets pending the payment of the composition, or that the bankrupts may be unable to pay their composition, and so that an assignee may necessarily be appointed. As to the first suggestion, it is a possibility merely, and cannot affect the present rights of the parties, nor would it be proper for the court, in view of such a bare possibility, to stay the proceedings of the lienor in order to enable the bankrupts and the creditors to do what they may never agree to do, and what is entirely at variance with their inten-

tions as expressed in what they have already done. As to the other suggestion, that the composition may be set aside, I think that it is enough to say that the bankrupts and the creditors, having agreed to an arrangement which preserves this lien upon proceedings which imply deliberate choice of remedies based on a careful consideration of their own best interests and the ability of the bankrupts to carry it out, are not entitled to ask that the secured creditor wait two years before realizing on his security upon the bare possibility that the arrangement may fail. They have taken the risk of the arrangement being successfully carried out, and cannot complain if it is treated by other parties in interest as if it were a final arrangement. I see nothing in the case of *In re* Bayly (19 N. B. R. 73), decided by Judge Wood, cited by complainants, which conflicts with the views here expressed. In this case the amount of the security is less than the debt secured by it, and the nature of the collateral security is such that there can be no loss or sacrifice of the property of the bankrupts in the application of the collateral to the debt. There is no ground for injunction, therefore, either because the bankrupts' other creditors have an interest over and above that of the secured creditor in the property attached, nor because the assets held by the secured creditor are likely to be sacrificed as by a ruinous sale. It is unnecessary to consider, therefore, whether in this case, if either of these circumstances appeared, an injunction would be proper.

It is insisted by the complainants that Hentz & Co. are bound by the composition, and that they cannot claim more than the composition percentage. This is true of their claims *in personam* against the bankrupt, but it does not affect or impair their rights *in rem* against the property on which they hold security. This suggestion is fully answered in the cases cited above.

The view taken of the case makes it unnecessary to consider whether Hentz & Co. have acquired any new rights in the property attached by their judgment and execution.

Injunction denied, and temporary stay vacated.

UNITED STATES DISTRICT COURT—NEW JERSEY.

JANUARY 21, 1879.

A specification which charges the offence in the words of the act is too vague and general. The particulars in which the bankrupt has offended should be so set forth that he may be apprised of the precise matters wherein it is claimed he has transgressed.

A specification which simply charges the bankrupt with having concealed his estate and effects, and with having concealed, removed, altered, and destroyed the books and writings relating thereto, is insufficient for want of an averment that such acts were done with intent to defraud creditors, and in not more particularly specifying what property was concealed, or what books and writings were destroyed.

## *In re FREDERICK K. CONDICT.*

On specifications against discharge.

*T. N. McCarter*, for opposing creditors.
*C. E. Hill*, for bankrupt.

Nixon, J.—Nine specifications are filed against the bankrupt's discharge. The counsel for the bankrupt in the argument moved to strike out six, to wit: the second, fourth, sixth, seventh, eighth, and ninth, as being vague and insufficient.

The second is in these words: "Because the said Frederick K. Condict, with the said other bankrupts, contrary to the provisions of the said Bankrupt Act and its several supplements, did conceal his and their estate and effects and did conceal, remove, alter and destroy the books and writings relating thereto."

The defects in this specification are (1) the want of an averment that the acts complained of were done with intent to defraud his creditors, and (2) in not more particularly specifying what property was concealed, or what books and writings were destroyed. No matters are presented in which the bankrupt can raise an issue. The third specification is obnoxious to the first objection stated in regard to the second. Perhaps the reference to schedule A would be sufficient as to the past entries in the cash-book and journal, but there is no allegation that

the things done were with any fraudulent intent. The fourth charges the bankrupt with being privy to the making of false, fictitious, and fraudulent entries in the books of account with intent to defraud the creditors, and by an amendment thereto, afterwards allowed by the court, it is specified that they were made in the cash-book and journal, and refers to schedule A, filed with the specification, as containing a large portion of such entries. I think this is sufficiently definite to disclose to the bankrupt the charges which he is to meet, and the motion to strike out is overruled. The objections to the sixth, seventh, eighth, and ninth specifications are well taken, and the case must stand as if none such were filed. It has been the uniform practice under the Bankrupt Act to consider all specifications as too vague and general which charge the offence in the words of the act. The particulars in which the bankrupt has offended should be so set forth that he may be apprised of the precise matters wherein he is alleged to have transgressed. (Blumenstiel's Bankruptcy, 504; *In re* Butterfield, 14 N. B. R., 147; *In re* Hill, 1 N. B. R., 275; *In re* Marston, 5 Ben., 313; *In re* Son, 1 N. B. R., 310; *In re* Eidom, 3 N. B. R., 106.) The case rests then upon the first, fourth, and fifth specifications. The first charges a preference contrary to the provisions of the Bankrupt Act, in transferring to one Stephen H. Condict, the father of the petitioner, in the month of November, 1869, their whole stock of merchandise for the purpose of preferring him as a creditor; the fourth with making or causing to be made false and fictitious entries in the books of account of the firm; and the fifth with giving fraudulent preferences to a number of their creditors, whose names are enumerated in Schedule B.

I have examined the evidence with care, and am of the opinion that the opposing creditors, upon whom the burden of proof rests, have failed to establish the truth of these specifications. It does not appear that Stephen H. Condict was a creditor of the firm when the sale of the merchandise was made to him, and if he had been, such a transfer, two or three years before the petition in bankruptcy was filed, was not

against the provisions of the Bankrupt Act in regard to preference to honest creditors. (*In re* Jones, 13 N. B. R., 286.)

The entries in books complained of, although irregular, seem to have been necessary to make them express the business of the partnership and to conform to the facts of the transactions as they actually existed, and the alleged fraudulent payments, as exhibited in Schedule B, were made to their *bona fide* creditors in the regular course of their business during the years 1869, 1870, and 1871, before any act of bankruptcy is shown to have been committed.

The petitioner is entitled to his discharge.

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## COURT OF APPEALS—NEW YORK.

JUNE 18, 1878.

**Section 40 of the Bankrupt Act (U. S. R. S., § 5024), which provides for the issuing of a provisional warrant, relates to property which belongs to the alleged bankrupt, and such as is in his possession and under his control, and cannot be extended so as to embrace property belonging to or in the possession of another person which such person claims to own, or in regard to which a serious dispute exists, even if it is alleged that such property has been transferred in violation of the act.**

## *MICHAEL L. DOYLE et al., respondents,* v. *GEORGE H. SHARPE, appellant.*

THIS action was brought to recover the value of a stock of drygoods which was seized by defendant, a United States marshal, as the property of L. & O., bankrupts. It appeared that the goods had been sold and transferred to plaintiffs before the proceedings in bankruptcy were instituted, and that they claimed to own them when the seizure was made. Defendant justified his seizure under a warrant issued in the bankruptcy proceedings under § 40 of the Bankrupt Act (U. S. R. S., § 5024), which directed him to take possession of all the property and effects of the debtors, and safely keep the same until the further order of the court.

*D. M. Porter*, for applt.

*Wm. Henry Arnoux*, for respondents.

*In re* Friedlob.

The loss of proofs of debt which have been filed is the misfortune of the bankrupt, and he cannot be legally discharged until they are supplied.

A creditor who has proved his debt is entitled to notice by *mail* of an application for a discharge, and he cannot be prejudiced by the loss of his proof from the files.

Where proofs of debts have been lost, a general notice of the meeting under the petition for discharge to all creditors named in the schedule, stating that if they have theretofore filed proof of debt, it will be necessary for them to supply it as it has been lost, is not sufficient. Such lost records must be supplied under Sections 899, 900, R. S. 122

Southard, assignee, *v.* Benner *et al.*

An assignee in bankruptcy has a right of action to set aside a fraudulent conveyance made by the bankrupt, although none of the creditors have acquired a specific lien.

An agreement between the parties to a chattel mortgage, outside of the mortgage, by which the mortgagor is allowed to continue dealing in the mortgaged property and to use the avails for his support and business, and to pay to the mortgagees such sums as he can spare from his general business, will invalidate the mortgage. 124

*In re* Edgar W. Moss.

The bankrupt was a stock and gold broker, but was not a member of the Stock Exchange. He took orders for the purchase and sale of stocks and gold, but conducted the business exclusively through the agency of other brokers who were members of the Exchange, and divided the commissions with them. *Held*, That he was not a merchant or tradesman within the meaning of the act, and as such disentitled to a discharge for failure to keep books of account. 132

*In re* Marks Cohen.

An action of claim and delivery of goods and chattels under the New York Code brought against a bankrupt must be stayed pending the question of his discharge so far as the action is one for the recovery of a money judgment for the value of the goods.

One W., in 1876, sold certain goods to the bankrupt, and in 1878 commenced an action of claim and delivery against him to recover the goods or their value. Upon the certificate of the sheriff that the goods had been concealed, removed, or disposed of, and upon affidavits setting forth that defendant had obtained the goods on credit by means of false representations as to his pecuniary circumstances and condition, and that said representations were made with intent to obtain the goods thereby and not to pay therefor, an order of arrest was granted. The bankrupt, who had been adjudicated prior to the commencement of the action, thereupon procured an order staying proceedings under the order of arrest and all proceedings in the action for the recovery of a money judgment for the value of the goods. On motion to vacate this order, *Held*, That the stay was properly granted. 133

McGehee *et al. v.* Hentz *et al.*

Every District Court in the United States has jurisdiction and authority to make all lawful orders and decrees in bankruptcy, although the original petition in bankruptcy was filed in another district, provided that the relief asked is such as cannot be given by the District Court where the original petition was filed, because the persons or property sought to be affected by the order or decree are beyond the reach of its process, and that they are within the reach of the process of the District Court whose aid is invoked.

An order made in a composition proceeding appointing the bankrupts custodians of their property does not put them in the position of an assignee so that they can maintain a suit under Section 4979.

The complainants, who are residents of the State of Louisiana, filed a petition in bankruptcy in that district, and proposed a composition, which was accepted and confirmed, and the complainants appointed custodians of their property, and authorized to protect and collect the same for the purposes of the composition and for the benefit of their creditors. The names and address of the defendants, H. & Co., and the amount of the debt due to them, were entered in the schedule annexed to the petition for composition. Within four months prior to the commencement of the proceedings in bankruptcy, the defendants, H. & Co., who were residents of the State of New York, commenced an action against complainants by publication, and attached a debt due to them from M. & Co., also residents of New York, of a less amount than their claim, and subsequently recovered judgment in said action. In a suit brought to obtain an injunction against H. & Co. and the sheriff to restrain their proceedings on the judgment, and for an accounting and payment of the debt by M. & Co., *Held*, That complainants were not entitled to relief in injunction; that, as no assignee has been appointed, the lien of the attachment continues, and is preserved by the Bankrupt Law; and that while H. & Co. are bound by the composition as to their claims *in personam* against the complainants, their rights *in rem* against the property attached are not affected or impaired thereby. 136

*In re* Frederick K. Condict.

A specification which charges the offence in the words of the act is too vague and general. The particulars in which the bankrupt has offended should be so set forth th t he may be apprised of the precise matters wherein it is claimed he has transgressed.

A specification which simply charges the bankrupt with having concealed his estate and effects, and with having concealed, removed, altered, and destroyed the books and writings relating thereto, is insufficient for want of an averment t at such acts were done with intent to defraud creditors, and in not more particularly specifying what property was concealed, or what books and writings were destroyed. 142

Doyle *et al. v.* Sharpe.

Section 40 of the Bankrupt Act (U. S. R. S., § 5024), which provides for the issuing of a provisional warrant, relates to property which belongs to the alleged bankrupt, and such as is in his possession and under his control, and cannot be extended so as to embrace property belonging to or in the possession of another person which such person claims to own, or in regard to which a serious dispute exists, even if it is alleged that such property has been transferred in violation of the act. 144

Geo R. Fowler

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# SYNOPSIS OF CASES, No. 4.

*In re* Lorenzo Van Buren *et al.*

Certain parties had a contract with the bankrupts under which there became due to them a large sum of money as their share of the proceeds of certain goods, which sum the bankrupts were under obligation to pay over as soon as the money was received by them. This they did not do, and when sued for an accounting under the contract, by means of false books, fictitious contracts and perjury, procured the recovery against themselves of a judgment for a grossly insufficient amount. After this judgment was entered and satisfied the plaintiffs therein discovered the fraud and commenced an action against the bankrupts for fraud, conspiracy and deceit. The latter action was commenced long before the commencement of the proceedings in bankruptcy, but judgment was not recovered until after that time. *Held*, That the debt was provable and that the bankrupt was entitled to a stay of proceedings in said action, including the service of an execution against the person which had been issued. 149

*In re* Henry and Moritz Kitzinger.

A debt may be proved in bankruptcy against the estate of the principal debtors, notwithstanding a joint judgment has been recovered therefor against the principal debtors and the surety.

The relation of principal and surety is not destroyed by the judgment.

The defence of usury is a personal defence; and a failure on the part of the bankrupts to avail themselves of it is not a fraud on creditors. Such defence is not open to the assignee. 152

*In re* Jacob August *et al.*

After an assignee had been appointed and had entered upon the discharge of his duties, resolutions of composition were accepted and confirmed, and the bankrupt complied with the conditions thereof. Thereupon the assignee filed his account and gave notice to creditors, in conformity with Section 5096, that he would apply for a settlement of his account and for a discharge from liability as assignee; and in pursuance of said notice a meeting of creditors was called. *Held*, Error; that upon confirmation of the resolution the creditors ceased to have any interest in the estate; that it then became the duty of the assignee to hand over the balance of assets in his hands to the bankrupt; and upon so doing, pursuant to the terms of the resolution, he would be completely discharged from further liability therefor.

The proper mode of ascertaining the amount of the estate in the assignee's hands, as between the assignee and the bankrupt, is to refer it to the register, by special order, to take account of the moneys received and disbursed by the assignee, and to report what amount he still holds, if any, to which the bankrupt is entitled.

The register is the proper person to whom to refer the account, even though questions are likely to arise in the settlement thereof in respect to charges of the register which have been paid by the assignee. If any question arises in respect to the register's fees, they must be taxed by the clerk, under General Order, No. 30, before they can be allowed. 161

*In re* The Bank of North Carolina.

The register in bankruptcy is the assistant of the district judge, and, as such, has power to make all such orders as are proper to be made in bankruptcy, except only such as are required by the act to be made by the judge, and such as the act in express terms provides that the register shall not make. Subject to these exceptions; whenever the law provides that the court may exercise a power, the register to whom the cause is referred may exercise that power when no opposition is manifested. 164

MILLER, J.—The sale of the goods to the plaintiffs was complete, and the transfer of the same was made before the proceedings in bankruptcy were instituted against Lagrave & Co. The plaintiffs agreed to pay the full value of the goods, as the verdict of the jury shows. They were apparently purchased in the ordinary course of business, by the giving of a note on time, which was paid at maturity, and possession of the same was taken, and the sale fully completed when they were seized by the defendant. The question whether the plaintiffs were *bona fide* purchasers for a valuable consideration, and had possession upon their own account and for themselves, was one for the jury, and we are unable to see that it was improperly submitted to their consideration on the trial by the judge in his charge. As they found for the plaintiffs, their verdict is not the subject of review upon this appeal.

The principal question for our determination relates to the right of the defendant, as United States marshal, to seize and take the goods in question from the plaintiffs, who were in possession and claimed to be owners of the same. The 40th Section of the U. S. Bankrupt Act, being § 5023 of the U. S. Revised Statutes, provides that a warrant may issue commanding the marshal "forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court." The warrant issued to the defendant contained a provision of this kind, in accordance with the statute.

The provision cited evidently relates to property which belongs to the judgment debtor, and such as is in his possession and over which he exercises control; and we think it cannot be extended in its operation so as to embrace property belonging to or in the possession of another person which such person claims to own, or in regard to the ownership of which a serious dispute exists. Even although it may be said that such property has been transferred in violation of some provisions of the Bankrupt Act, and that the transfer is void for that reason, the marshal has not necessarily the power under the statute cited to assume to seize the property, and thus to settle the question

in dispute according to his own judgment. Such authority would vest in that officer a power of a dangerous character, which might be arbitrarily exercised to the detriment of persons who had possession and claimed to own the property, and great wrong and injustice done thereby. The proper legal mode of determining such a controversy should be in an action brought by the assignee in bankruptcy before a competent tribunal, where the subject could be fully investigated and the rights of the parties disposed of by means of the usual and orderly proceedings of a court of justice. That such is the true course is fully supported by authority. In *Re* Harthill (4 N. B. R., 392, 4 Ben., 448) the marshal took possession of certain property conveyed by the bankrupt to another person. An application was made to the court to have it restored to such person, and a reference ordered to take proof as to the validity and *bona fides* of the purchase made from the bankrupt. On a motion for an order directing that the proceeds of the property be delivered to such purchaser, Blatchford, J., held, That irrespective of any determination of the question of fact as to the validity and *bona fides* of the purchase, the warrant which commanded the marshal to take possession of the property conveyed by the bankrupt transcended the power conferred by the 40th Section of the act, and should have stopped with commanding him to take possession of the property of the owner; and that the petitioner was entitled to relief, leaving the assignee to take such affirmative proceedings against him as he might deem proper. It is said that "such proceedings must be taken by a pleading, making proper averments, and calling for an answer, on which an issue raised can be tried, leading to a determination which the aggrieved party can have reviewed."

In *Re* George B. Holland, Jr. (12 N. B. R., 403; U. S. District Court of Texas), where goods had been seized by the marshal which had been purchased and conveyed to the petitioner two months previously by the bankrupt, and the question of the *bona fides* of the sale and whether the transfer was in fraud of the rights of creditors, it was held that this could only be determined by a proper judicial tribunal, and that the

40th Section conferred no authority upon the court to order the seizure of property or effects, except such as *belong to and are in possession of the debtor;* and that no authority was conferred for ordering the seizure of property from the possession of a person to whom the debtor had transferred it prior to the filing of the creditor's petition. In the cases cited the court had directed the seizure, which renders them far stronger than when the marshal is merely acting according to and under the provisions of the act, without any special directions. (See also *Mollison* v. *Eaton*, 16 Minn., 426.)

We have been referred to some cases which are apparently in conflict with the rule laid down in the cases cited. (See *In re* Briggs, 3 N. B. R., 638, decided in the Eastern District of the State of Michigan; *Stevenson* v. *McLaren*, 14 N. B. R., 403, decided in the State of Minnesota.) But we think the cases first cited enunciate the correct rule, and should be followed; and that it is more consistent with the purposes of the Bankrupt Act, and the due administration of the law, to compel the assignee, who has full and ample powers for that purpose, to pursue a remedy by action for property which has been transferred in violation of the Bankrupt Act in the courts, than to vest absolute authority and discretion in an executive officer to seize such property under such a claim. No one can be injured by a rule of this kind; while, on the other hand, great wrongs might be committed under color of law. Cases might perhaps arise where the claim of a third person might be destitute of any foundation or pretence, which would justify such a seizure; but under ordinary circumstances, and especially such as are developed in the case at bar, we think that the defendant had no authority and was liable.

In arriving at this conclusion we have not failed to bear in mind those provisions of the Bankrupt Act which are aimed directly against transfers of property in violation of its object and intent, which are declared to be absolutely void under the statutes of the United States, and the authorities cited which relate to that question. That the sale or transfer is

fraudulent and void under the act furnishes no sufficient reason for seizing the property in the actual possession of another, who *prima facie* has a lawful title.

In support of the principle laid down, numerous decisions in bankrupt cases hold that in cases where the assignee in bankruptcy claims a fund as the property of the bankrupt, which, some time before the bankruptcy, was transferred to a third person who claims to hold adversely to the assignee, the proceedings in the District Court should not be summary, by petition and an order to show cause, but should be formal, by an action at law or a suit in equity. (*Smith* v. *Mason*, 6 N. B. R., 1, 14 Wall., 419; *In re* Marter, 12 N. B. R., 185; *Barker* v. *Smith*, Id., 474; *Leighton* v. *Harwood*, Id., 360; *Marshall* v. *Knox*, 8 N. B. R., 97, 16 Wall., 551; *Hathaway* v. *Brown*, 18 Minn., 414.) If the views expressed are sound, then the question as to the right of the plaintiffs was for the jury, and the judge committed no error in charging them that if Doyle, as a matter of fact, was in possession of the goods, claiming them as owner himself, that the plaintiffs were entitled to recover their value. The charge thus made presented the true construction to be put upon the statute, and was entirely correct.

The refusal to charge that if the whole plan was to procure the goods of Lagrave & Co. to have them applied on the debt due by that firm to Claflin & Co., the plaintiffs were not entitled to recover, was not erroneous. It was fully covered by that portion of the charge in which the judge submitted to the jury the question whether the transaction was a sham or real one, and might have been properly refused for that reason. But if the charge of the judge, as already stated, was correct, it covered the whole case, and the request made was immaterial, and might very properly have been refused for that reason.

So also the request to charge that the testimony of the plaintiff, that he purchased the goods and paid for them, was not conclusive, but must be considered with all the other facts proven in the case, and particularly with his knowledge of the facts, was substantially covered by the charge as made. After

discussing the question as to the knowledge of Doyle of any purpose of Lagrave and Landers to take the goods out of the way, to prevent their getting into the hands of the creditors of Lagrave & Co. or of the marshal, the judge did charge that whether he knew it or not, if, as a matter of fact, he assumed to buy these goods, acting for himself and not for the interest of another, taking them into his possession and paying the money for himself and not for some unknown or hidden purpose, then he was entitled to recover. This was clearly right, within the principle which has been discussed, and can be upheld.

The questions we have examined dispose of the case and must lead to an affirmance of the judgment.

All concur.

## UNITED STATES DISTRICT COURT—S.D. NEW YORK.

APRIL 23, 1879.

Certain parties had a contract with the bankrupts under which there became due to them a large sum of money as their share of the proceeds of certain goods, which sum the bankrupts were under obligation to pay over as soon as the money was received by them. This they did not do, and when sued for an accounting under the contract, by means of false books, fictitious contracts and perjury, procured the recovery against themselves of a judgment for a grossly insufficient amount. After this judgment was entered and satisfied the plaintiffs therein discovered the fraud and commenced an action against the bankrupts for fraud, conspiracy and deceit. The latter action was commenced long before the commencement of the proceedings in bankruptcy, but judgment was not recovered until after that time. *Held*, That the debt was provable and that the bankrupt was entitled to a stay of proceedings in said action, including the service of an execution against the person which had been issued.

### *In re LORENZO VAN BUREN et al.*

*Alvin Burt*, for bankrupts.
*Wm. W. Badger*, for creditors.

CHOATE, J.—This is a motion to stay proceedings in an action against the bankrupts after judgment and after the issue, but before the service of an execution against the person. The

judgment was recovered since the filing of the petition in bankruptcy in an action commenced long prior thereto. On behalf of the creditors it is claimed that the service of the execution cannot be stayed in a case where the debt is not dischargeable, being one, as is alleged, created by the fraud of the bankrupt, and that in this case the debt was not dischargeable. The uniform ruling in this court has been, however, that if final judgment has not been recovered before the filing of the petition in bankruptcy, proceedings at any stage of the action, before or after judgment, will be stayed if the claim is provable, whether dischargeable or not, and that under Sections 5106, 5107, and 5117 of the Rev. Statutes, while a party who has been arrested before a stay is applied for will not be released if the debt is not dischargeable, yet the only test upon an application for a stay of proceedings under Section 5106 is whether the debt is provable. And in practice a stay is constantly granted after judgment. (See *In re* Rosenberg, 2 N. B. R., 236; *In re* Schwartz, 15 N. B. R., 330.) Indeed, in a very late case on this subject, which is cited and relied on by the learned counsel for the creditor (*In re* Alsberg, 16 N. B. R., 116), the rule is thus stated by Judge Bradford, and apparently approved by Mr. Justice Story: "The result of the authorities is that when a debt is provable, all actions against the debtor pending proceedings in bankruptcy shall be stayed, *including arrests*, with the exception that if the bankrupt *has been arrested* on a debt not dischargeable he shall not be released from the arrest by the Bankrupt Court." To the same effect seems to be the decision of the Supreme Court of Louisiana in *Keating* v. *Arthur* (27 La. An., 570). The only question, therefore, is whether the debt is provable.

While claims for unliquidated damages for purely personal torts have been excluded from proof, great liberality of construction has been shown in interpreting the word "debts" in the Bankrupt Law of 1867, Rev. Stat., Sec. 5067. It has been held that a claim of the United States for the value of goods forfeited by violation of the revenue laws is provable. (*In re* Vetterlein, 13 Blatch., 44.)

Claims for conversion of personal property are clearly provable, and are referred to as such in Section 5067. (*Cole* v. *Roach*, 10 N. B. R., 288.) In *Re* Schwartz, 15 N. B. R., 330), Judge Johnston says: "Where a claim originated in contract, although fraudulently induced, and is prosecuted in an action sounding in tort, it continues to constitute a provable debt, even though the fraud must be proved to entitle the plaintiff to a recovery." It is evident that the form of action provided by law for the recovery of the claim is not decisive, and has very little bearing on the question. Nor does the recovery of a judgment so merge the original cause of action as to preclude the Bankrupt Court from inquiring into its real character.

In the present case the plaintiffs in the action had a contract with the bankrupts, under which there became due to the plaintiffs a large sum of money as their share of the proceeds of certain goods. The bankrupts were under obligations to pay over this certain part of the proceeds on its receipt by them. Instead of doing so, they made false entries in their books, and, by conspiring with other parties, produced false and fictitious contracts with these other parties, and when sued for an accounting under the contract they procured the recovery against themselves of a judgment for a grossly insufficient amount by the use of these false books, fictitious contracts, and perjury upon the trial, and the fraud was not discovered until after the judgment was entered and satisfied of record.

The plaintiffs then brought this action for the fraud, conspiracy, and deceit, whereby without fault on their part they had been deprived of a judgment for the true amount due, and they claimed damages in the amount in which the recovery on the former action fell short of the true amount due. The Court of Appeals has decided, and their decision is of course conclusive, that the plaintiffs could recover in that form of action. But it is equally true that it is consistent with their opinion—indeed it is distinctly affirmed therein—that the plaintiffs had another remedy on the same facts, which was by an equitable suit to have the former judgment set aside, and then to recover the same amount upon a new and correct accounting.

It may be that by recovering a judgment in their present action, the first of which is the perpetration of a fraud whereby they were precluded by the former judgment from recovering what was due to them under the contract, they have now cut themselves off from this equitable remedy; but the question is whether at the filing of the petition in bankruptcy the plaintiffs had a provable claim, and I cannot doubt that if they had then presented their claim to this court, as a claim to have the former judgment set aside for the fraud and to recover what was still due under the contract, their claim would have been adjusted under the order of this court and admitted to proof. It would have been regarded as a claim in its essential character growing out of a contract, and a "debt" provable under Section 5067. Any other disposition of their claim, if there had been assets to divide, would have justly seemed very oppressive to them. The fact that there are no assets does not of course alter the case, though it may have made it more for the interest of the plaintiffs to pursue other remedies; nor does what has happened since the filing of the petition, the recovery of the same damages in an action sounding in tort, in my opinion, on the decided cases, so alter the nature of the debt that they are precluded from proving it.

The plaintiffs have in fact, since the judgment, proved their debt, which shows that they themselves, or their legal advisers, regard the claim as a provable one. In this I think they are right.

Stay continued.

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## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

MAY 7, 1879.

A debt may be proved in bankruptcy against the estate of the principal debtors, notwithstanding a joint judgment has been recovered therefor against the principal debtors and the surety.

The relation of principal and surety is not destroyed by the judgment.

The defence of usury is a personal defence; and a failure on the part of the

bankrupts to avail themselves of it is not a fraud on creditors. Such defence is not open to the assignee.

## *In re HENRY KITZINGER and MORITZ KITZINGER.*

THE facts appear fully in the opinion.

*F. N. Bangs*, for bankrupts.
*E. P. Wheeler*, for trustee.

CHOATE, J.—This is an application for the re-examination of a proof of debt made by one Goldman against the joint estate of the bankrupts. The case involves the determination of the question whether the claimant is entitled to prove against the joint estate or only against the separate estate of the bankrupts, and also the question whether the defense of usury is available against him.

The bankruptcy proceedings were commenced against the two bankrupts above named and one Schlesinger as copartners, composing the firm of Kitzinger Brothers.

The date of the commencement of the proceedings in bankruptcy must be taken to be in accordance with an order of the court herein, February 8, 1878. In this proceeding Schlesinger denied that he was a partner in the firm or liable to be adjudicated as such, and after a trial of the question the court has so held, and the petition as to him has been dismissed, and an adjudication made against the other two as comprising the firm of Kitzinger Brothers.

Prior to the filing of the petition, Goldman, who had loaned money to the firm, and held therefor the firm notes, which were dishonored at maturity, sued the three on said notes, and recovered four judgments against them jointly. Goldman now offers to prove his debt against these two bankrupts jointly, setting forth in his proof of debt the judgments and the facts as to the loan to the firm, the giving of the notes, and the representations to him and his belief that Schlesinger was a partner. The trustee objects to this proof of debt on the following

grounds: (1) That the decree in this proceeding adjudging that Schlesinger was not a partner and that these two bankrupts alone composed the firm is conclusive on all the parties to the record, including all the creditors. (2) That the claimant cannot go behind the judgments for the purpose of showing that the loan was actually made to these two bankrupts, and not to them with Schlesinger, as alleged in the complaints, and that the notes had become merged in and extinguished by the judgments and cannot be made the basis of a proof of debt; and (3) that if the claimant is at liberty to go behind the judgments the trustee can establish any defense to the notes which the debtors could set up, and that the notes were void for usury.

There is no doubt that the question, what persons composed the firm of Kitzinger Brothers, was directly involved in the issue tried in this proceeding, and that the determination of the same being a question which the court had jurisdiction to try is pending, and conclusive, until reversed, on all the creditors. (*In re* Griffith & Wundrum, 18 N. B. R., 510.)

One of the questions in this case is, whether a joint judgment against the three is in itself a bar to showing that the debt on which it is recovered is the debt of two as principal obligors and the debt of Schlesinger as surety for them—in other words, whether a judgment against the two bankrupts and Schlesinger jointly is an absolute merger of the prior obligation, so that while before the two bankrupts were bound as principals and Schlesinger as surety only, yet after judgment, and for the purpose of proving in bankruptcy, the debt must be conclusively held to be simply the joint obligation of the three. On the one hand it is not contested that if Schlesinger was not a partner in fact, but only held out to Goldman as a partner so that he could elect to join him in a suit as a joint obligor, the debt would be, aside from the question of usury, and but for the judgment, a firm obligation provable against the joint estate; and on the other side, it is conceded that if the case is *simply* one of a joint obligation of the three it must be proved against the separate estates of the bankrupts, and, as such, will be entitled to

share only in the surplus of the firm estate after the joint debts have been paid in full.

Reserving for the present the question whether there is anything in the particular form of Goldman's complaints in his actions on which the judgments were recovered which operates as an estoppel by recital and pleading, I think it is clear that the mere fact of the recovery of a judgment against the principal debtors and the surety for the debt does not so destroy the relation of principal and surety, or work such a merger of the prior debt, that it cannot be shown for the purpose of proving debts in bankruptcy that the obligation was the real debt of two of the judgment debtors as principals and of the other as surety.

The case of *Bangs* v. *Strong* (4 N. Y., 315) contains a strong expression of opinion that the relation of principal and surety remains so far intact, even after a joint judgment against them, that the surety is released if time is given to the principal, even after such judgment. It is true that this point seems to have been involved in rulings at an earlier stage of the case, and the decision then made was held to be conclusive on the party; but that particular point whether the surety is so discharged after judgment is of no consequence in this case, for that decision, as well as those cited by the learned counsel for the trustee as conflicting with it on this particular point of the effect of the indulgence given to the principal after judgment against the surety, all recognize as unquestionable that the relation of principal and surety as between themselves is not extinguished by the judgment, but continues.

These cases all assume that after such a joint judgment the surety may still pay the debt and recover the amount so paid of the principal as co-judgment debtor. Any other rule would of course be grossly unjust. What is said in the cases therefore about the surety becoming by the judgment a "principal debtor" is not said with reference to his relations to his principal, but means merely that as to his judgment creditor he becomes absolutely bound like any other judgment debtor. This is evidently the meaning of the expression as used in

*Lenox* v. *Proul* (3 Wh., 520). This is also all that is meant by Chancellor Kent by the same expression in *Bay* v. *Tallmadge* (5 Johns. Ch., 305), and by the court in *Findlay's Executors* v. *Bank of U. S.* (2 McLean, 44). In all these cases the point was not whether after a joint judgment *all* the rights of the surety are extinguished by a rigid application of the technical doctrine of merger, but whether after a judgment against the surety, be it a joint or a several judgment, his rights as against the creditor are not to some extent impaired, and they hold that as to him the obligation had become absolute, and no longer conditional on a certain rule of diligence. These courts held, as in *Pole* v. *Ford* (2 Chitty, 125), "that the rule that giving indulgence to an acceptor (principal debtor) without the consent of the drawer (surety) discharges such drawer, does not apply after judgment."

The case of *Bangs* v. *Strong* seems to rule this point otherwise for the State of New York, but whether it does or not is immaterial, since all the cases hold that the rights and remedies of the surety, as against his principal, are unimpaired after judgment. Therefore, waiving now the question of the form of the complaints, there can be no doubt that on the facts shown relative to the origin of this debt as against Schlesinger he was holden merely because he had been held out as a partner, and that the debt was in reality the debt of the two bankrupts, and that he could, on payment of the judgment, recover the same of the bankrupts, or could now make proof as for a contingent debt under Section 5068. If then, as between principal and surety, a judgment against them does not operate as a merger, there is no reason why, as between the creditor and the principal, it should in equity be held to have such an effect. There is no reason why the equity of the surety should not be worked out through proof in this case by the creditor against the principal, since it is but doing directly what the surety can do indirectly.

In many respects the rules of administering bankrupts' estates and marshalling assets are affected by the fact that parties bear to each other the relation of principal and surety.

Thus, it is the rule in England, certainly, that a joint obligation, partnership or otherwise, cannot be proved against the separate estate of one of the contractors in bankruptcy, unless there be no solvent co-contractor; but it is otherwise when the bankrupt is the principal debtor and the other is a surety. In such cases proof can be made though the surety is solvent, and this upon the uniform ground of justice, that the debt is the real debt of the bankrupt. (*Ex parte* Field, 7 Jur., Part 1, 382; *Ex parte* Buckingham, 612; *Ex parte* Crossfield, 1 Deac., 405; *Hoar* v. *Oriental Bank*, I. R. 2 App. Cas., 589.) That courts of equity will inquire, whatever may be the *form* of the obligation, as to real nature of the debt, for the purpose of equitable distribution of a fund with the distribution of which they are charged, and that the protection of sureties is especially cared for, are well settled principles, and have received many illustrations in adjudged cases. (*Berkshire Woolen Co.* v. *Juilliard*, *N. Y.* Ct. of App. unreported; *Thompson* v. *Taylor*, 72 N. Y., 32.) Courts of bankruptcy are courts of equity, and must apply equitable rules. There is no sound reason why the equities of principal and surety after a joint judgment against them, where a joint judgment is a remedy open to the creditor, and which the surety could in no way resist, should not be held unimpaired after judgment as before, except so far as the absolute rights secured by law to a judgment creditor necessarily abridge them for his benefit, and this seems to be the equitable doctrine. Equity, therefore, must recognize and give effect in every other respect to the relation of suretyship and the resulting rights and remedies, and must recognize the debt as the real debt of the principal and not of the surety. The only position adverse to this is that the original obligation is *merged* in the judgment, but this, as we have seen, is not so. There is in no sense, so far as the surety is concerned, an absolute merger. Nor does the rule allowing the creditor to prove work any injustice to other creditors. This creditor has, it is true, his judgment against the surety as a collateral security, but the other creditors clearly have no equity to compel him to resort to that. On the other hand it is the equity of the surety to compel him to

resort to the bankrupt principal in the first instance. For these reasons I think it is clear that the recovery of a judgment against the principal and surety jointly, where there is not in such recovery, as by the recital and the pleadings, an estoppel conclusive against the creditor as to the existence of the relation of principal and surety, does not preclude the judgment creditor from proving his debt against the principal afterwards becoming bankrupt. The question still remains, however, whether the creditor is in this case estopped by his pleadings. In one of the complaints he states his cause of action as a loan to Henry and Moritz Kitzinger and Louis Schlesinger. In the others he declares upon notes made by the firm of Kitzinger Brothers, alleging that the three persons named were partners in trade, doing business under the firm name of Kitzinger Brothers, and that "said firm by its said firm name made its promissory notes, &c. Whereby said firm, consisting of said defendants, promised to pay, &c." It is evident from the complaint itself, and also from the testimony, that the complaint was drawn under the impression and belief that Schlesinger was in fact a member of the firm. The particular point now under consideration was not in the mind of the pleader, or he might, if he had anticipated this objection to his proof, have set out the facts that the two Kitzingers composed the firm, that they and Schlesinger represented to him and induced him to believe that the three composed the firm, that he loaned the money to the firm, and took the note of the firm, believing in the truth of these representations and relying thereon. This, no doubt, under the New York Code, would be a good complaint; but, even if the pleader had known these facts, was he bound to set them forth in that way? On the contrary, would not his complaints, as they are, be a proper mode of stating those facts, *according to their legal effect?*

Notwithstanding all the modern changes in the rules of pleading, facts may, it is believed, still be pleaded according to their legal effect. Judged by this rule, it seems to me that an answer by Schlesinger to the complaints served, setting up the exact facts, would have been demurrable, and that the plain-

tiff would be entitled to recover on these complaints as they are on showing a *joint liability*, by the application of the doctrine of estoppel—that is, by proof of the actual facts—and could well prove his case without showing the existence of the partnership relation in fact between Schlesinger and the other defendants, on proof that Schlesinger was held out to him as a partner under circumstances estopping to deny the partnership as against Goldman. The actual existence of the partnership relation need not have been proved, but only such facts as would estop the defendants, including Schlesinger, from denying the joint obligation as of partners. Then it seems to me that the averment of the actual existence of the partnership relation is an immaterial averment, not of the substance of the issue, and that the plaintiff is not by the recital thereof in his complaint estopped to show the contrary. A party cannot well be held estopped to show what he could have shown in proof of his pleading, for that cannot be considered in law inconsistent with it. (See 2 Smith's L. C., 7th Amer. Ed., 80.)

Estoppels by statements in a pleading do not arise except as to those matters which are necessarily alleged as the basis of the cause of action, or the defense, and which, if put at issue and proved or disproved, would be decisive of the action; and, as judgment passing on such matter, the estoppel is mutual, both parties being concluded. (*Boileau* v. *Rutter*, 2 Exch., 681; *Havens* v. *Hartford & N.H. RR. Co.*, 28 Conn., 69.) Indeed this would be a most extraordinary and inequitable application of the doctrine of estoppel if it must be held applicable. All the parties in this proceeding, including this trustee, are estopped by the decree of the court herein from claiming that Schlesinger was in fact a partner. That decree was entered long after these judgments were entered, and after a long litigation, in which all these parties were engaged, to ascertain the truth in respect to this very question of fact. It was not at all inconsistent with this fact, so conclusively determined, that Schlesinger might be liable for this debt jointly with the bankrupts, and by way of surety, from his having been held out to them as a partner, and when he was sued

jointly with them, and put in no defense, it is to be assumed from that very fact that he knew that he was jointly liable, and it was a matter of indifference to him whether the cause of action was described with technical accuracy in the complaint or not. As he put in no answer and raised no issue of fact, the plaintiff cannot be estopped by the recitals of his complaint, except as to such allegations as constitute an *essential* part of his alleged course of action. In this case the *essential* part is the joint promise, and not the existence of the partnership relation.

At the time these judgments were entered, the creditors, whom the trustee now represents in contesting this claim, were strenuously contending that Schlesinger was a partner in fact. If he was bound jointly to them with the bankrupts by estoppel, they have, or might have had, the benefit of such collateral security as well as the claimant. There is no merit in the objection which seeks to exclude him from the benefit of a security he is apparently entitled to, and which does not impair or affect their rights against the bankrupt estate upon merely technical grounds, by reason of an unessential inaccuracy of the statement of his cause of action, which inaccuracy was itself caused by a misapprehension as to the matter of fact or matter of law under which they as well as he were then acting. There being no estoppel, either technical or equitable, to prevent the creditor from showing that the partnership relation did not in fact exist, it is unnecessary to consider the effect the subsequent judgment in a proceeding between the same parties and binding upon them both, whereby it was determined that this relation did not exist, would have had on a prior estoppel by pleading and record if it had existed, or whether it would be a case where an estoppel against estoppel would have left the matter at large.

The defense of usury in the notes on which the judgments were recovered is not open to the trustee. Doubtless, when the issue is whether the transfer of property before the bankruptcy was fraudulent as against creditors, the fact that judgments had been recovered against the bankrupt, and title was made

under such judgments, would not estop the assignee from inquiring whether those judgments were collusively obtained and fraudulent. (*Humes* v. *Scruggs*, 4 Otto, 22.) But here there is no such issue, nor any evidence that the actions were not carried on in entire good faith, nor that the bankrupts, in failing to appear and answer, were not acting in equal good faith. The defense of usury is a personal defense. If in this case it could have been set up by the bankrupts, and they failed to set it up, having as they then had full power to avail themselves of it or not, which was a personal privilege, it seems to me that the assignee in bankruptcy cannot reopen the question. A failure to take advantage of a possible defense of this character is certainly not in itself a fraud upon creditors. It appears also to have been held in this very case by Judge Blatchford that the judgments were conclusive on the assignee as to the fact of indebtedness. The fact that the relation of the defendants to each other as principal and surety may be shown in order to give proper equitable relief does not open the judgments or make them less conclusive as evidences of indebtedness.

It is unnecessary to consider the other grounds urged on behalf of the bankrupts for sustaining the proof of their claim.

Motion to expunge denied, with costs to be paid out of the estate.

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## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

APRIL 21, 1879.

**After an assignee had been appointed and had entered upon the discharge of his duties, resolutions of composition were accepted and confirmed, and the bankrupt complied with the conditions thereof. Thereupon the assignee filed his account and gave notice to creditors, in conformity with Section 5096, that he would apply for a settlement of his account and for a discharge from liability as assignee; and in pursuance of said notice a meeting of creditors was called. *Held*, Error; that upon confirmation of the resolution the creditors ceased to have any interest in the estate; that it then became the duty of the assignee to hand over the balance of**

assets in his hands to the bankrupt; and upon so doing, pursuant to the terms of the resolution, he would be completely discharged from further liability therefor.

The proper mode of ascertaining the amount of the estate in the assignee's hands, as between the assignee and the bankrupt, is to refer it to the register, by special order, to take account of the moneys received and disbursed by the assignee, and to report what amount he still holds, if any, to which the bankrupt is entitled.

The register is the proper person to whom to refer the account, even though questions are likely to arise in the settlement thereof in respect to charges of the register which have been paid by the assignee. If any question arises in respect to the register's fees, they must be taxed by the clerk, under General Order, No. 80, before they can be allowed.

## *In re JACOB AUGUST et al.*

THE facts appear fully in the opinion.

*Prescott & Butler* and *E. W. Bloomingdale*, for bankrupt.
*W. T. Carlisle*, for assignee.

CHOATE, J.—In this case a composition has been accepted and confirmed, which provides for the payment of ten per cent. in cash and twelve and a half per cent. more to be secured by the notes of the bankrupts, payable in six or twelve months. The cash instalments having been paid and the notes given conformably to the resolution, and the assignee having filed his account with the register, he gave notice to the creditors, in conformity with Rev. Stat., Sec. 5096, that he would apply for a settlement of his account and for a discharge from his liability as assignee. In pursuance of this notice, a meeting of creditors has been convened for the purpose of passing the assignee's account. At that meeting the bankrupts objected to the regularity of the proceedings, on the ground that the creditors have no interest in the funds in the hands of the assignee; that, since the confirmation of the composition, the bankrupts alone are entitled to whatever of their estate is in the hands of the assignee; and that any question arising between the bankrupt and the assignee, as to what amount of money the assignee should pay over as the balance in his hands, should be determined under a special order of the court, and not upon a final accounting or a creditors' meeting pursuant to Rev. Stat., Sec.

5096. The bankrupts now move, on notice to the assignee, that it be referred to the clerk of this court to ascertain the amount due from the assignee to the bankrupts.

The position taken by the bankrupts in respect to the meeting of creditors called to pass the final account of the assignee is correct. Such meeting should not have been called. The creditors have in fact consented, by adopting the resolutions of composition, that the entire estate be delivered to the bankrupts to enable them to perform, on their part, the agreement of composition. Thereupon it became the duty of the assignee to hand over any balance of money remaining in his hands to the bankrupt, and also any other assets belonging to the estate. His functions, so far at least as the administering of the bankrupts' estate is concerned, are, by the confirmation of the composition and the bankrupts' compliance with the conditions thereof, which were precedent to the delivery of the property to them, suspended, subject, however, to being revived in case, under the power reserved by the statute to the court, an order shall hereafter be made setting aside the composition. The delivery by the assignee of any money or property to the bankrupts, pursuant to the terms of the composition, completely discharges him from further liability therefor; the creditors having consented that he pay over the money in his hands to the bankrupts have necessarily waived any right which, but for this agreement, they would have had to call him to an account therefor, at least so long as that agreement remains in force. The account to be taken at a creditors' meeting under Section 5096 is professedly preparatory to the declaring of a dividend, and no such dividend is now possible.

The court has power to enforce the terms of the composition, and therefore will, upon the application of either party, determine any questions that may arise in such a case between the assignee and the bankrupts as to what is the balance of the estate in the assignee's hands to which the bankrupts are entitled. The proper mode of doing this is to refer it to the register in charge of the case, by special order, to take account of the money received and disbursed by the assignee, and to re-

port what amount he stills holds, if any, which the bankrupts are entitled to. It is urged that as this is not a duty specially imposed on the register by the statute, the court may refer the matter to the clerk. Doubtless it is within the power of the court to dispense with the assistance of the register in this or any other matter; but the evident design of the statute is, that when the court needs the aid of such an officer in the performance of duties of this general character in the administration of the bankrupt law, it shall call to its assistance the registers. (Rev. Stat., §§ 4993, 4998; General Orders 5 and 19.) No cause is shown for not referring this matter to the register. It would not, therefore, be proper to refer it to any other person. It is suggested, however, that questions are likely to arise in the settlement of the account in respect to charges of the register paid by the assignee, and which he asks to have allowed as disbursements. This constitutes no reason for withholding the order referring the account to the register. In respect to the register's fees, if any question arises, they must be taxed by the clerk, pursuant to General Order, No. 30, before they can be allowed; and an order therefor will be made on application of the bankrupts.

Order referring the matter to the register.

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UNITED STATES DISTRICT COURT—E. D. NORTH CAROLINA.

JUNE 8, 1879.

**The register in bankruptcy is the assistant of the district judge, and, as such, has power to make all such orders as are proper to be made in bankruptcy, except only such as are required by the act to be made by the judge, and such as the act in express terms provides that the register shall not make. Subject to these exceptions; whenever the law provides that the court may exercise a power, the register to whom the cause is referred may exercise that power when no opposition is manifested.**

## *In re THE BANK OF NORTH CAROLINA.*

THIS is a motion made by the assignee to expunge from the records the order for a sale of such *choses in action*, belong-

ing to the estate of the bankrupt, as "*could not be collected without inconvenient delay* or expense," made by the register, under the signature of the clerk and the seal of the court, upon the application of the assignee therefor.

The principal point relied upon by the counsel for the assignee was that the register had no power to make such order.

*Merimon, Fuller & Ashe*, for the assignee.

*Tourgee, Reade & Battle*, for the respondents (purchasers at sale).

BROOKS, J.—There is but a single question presented by this motion, made by the solicitors for the assignee.

They ask that the order heretofore granted upon the petition of the assignee for the sale of *choses in action*, belonging to the estate of the bankrupt corporation, be rescinded or revoked.

This motion is made and filed, in writing, in conformity with the practice of the court, in which is set forth the reasons for which they ask that the order of sale shall be revoked.

Whether the order the assignee now asks should be granted, depends upon the power vested by law in the register, to whom this case had been referred, to make the order which they now say should be annulled.

It is insisted, in support of this motion, that Mr. Register Shaffer had no power to consider the application of the assignee or to make the order referred to.

This question has been fully and ably argued by counsel, and carefully considered.

I conclude that the register in bankruptcy has power to direct a sale of debts, *or choses in action* belonging to or being a part of the bankrupt's estate, upon a proper application, if there be no objection made by a person or party having some interest in the proper distribution of the bankrupt estate. It does not appear that any opposition was offered or expressed by any party to the entry of the order complained of.

I have so concluded, for the following reasons:

*First.*—It has been the practice in this district for the register

to hear these petitions and make such orders—a practice so invariable as to be almost without exception; for, of the thousands of such orders as have been entered in bankruptcy proceedings in the district under the existing law, probably not more than eight or ten were ever considered or signed by me; and these were only so considered because I was, at the time, more accessible than the register to the assignee or their counsel, who desired such orders, and only for their convenience.

*Second.*—I am persuaded that such has not only been the practice in this district, but that it has been the almost invariable practice in every other district in the United States.

*Third.*—It is clear, I think, that the power is intended to be conferred (and in fact is conferred) by the law upon the register to make all such orders as are proper to be made in any bankruptcy proceedings, except only such as the law provides in express terms he shall not make, and such others as the law provides that the judge of the Bankruptcy Court shall make. Keeping these exceptions in view, wherever it is provided in the law that the court may exercise a power, the register to whom a case in bankruptcy has been referred may exercise that power, unless some person, having some interest in the proper distribution of the estate of the bankrupt, shall make some objection to the exercise thereof.

That a register in bankruptcy is not such a mere clerk, or servant, of the district judge as the counsel for the assignee insists he is, may be (at least) inferred from one of the qualifications required. I refer to the provisions of Section 4994 of the Revised Statutes, which declares that "no person shall be eligible for appointment as register in bankruptcy unless he is a counsellor of the District Court for which he is appointed, or of some one of the courts of record of the State in which he resides."

Now if it was intended that the register should perform the duties of a clerk merely, and had no power to do more than make calculations, and write that which the judge may direct, it would strike every lawyer at once that the requirement, that the register should be a lawyer, was not only useless and sense-

less, but one positively detrimental to the prompt progress of the business of the court (and I might add) to the comfort of the district judge.

If a *clerk* only was required to write and compute figures quickly and correctly, I am sure that no judge of my experience would be apt to prefer lawyers as a class for that service, for we all know that lawyers, as such, are not distinguished for the legibility of their penmanship. What, then, was the object of the requirement, if it was not that the register is designed (as I hold the law declares he is) an assistant of the district judge?

If the power was not with the register to examine such an application when filed in a cause pending before him, and to grant the order in any case in which there is no objection made, I can scarcely see what a register may properly do that may not be as well done, and perhaps better, by others than lawyers as a class.

I will remark here that the charge made by the counsel for the assignee, that the application for the order of sale was caused by any improper solicitation or interference of the register, I do not regard as sustained by the record, and certainly is not sustained by the testimony offered in support of this motion. The counsel for the assignee, when they offered to examine the register, stated that they were conscious that they would be bound by his answers as a witness tendered by them. If it had become pertinent as a question in this proceeding, I would not have agreed with the counsel in that opinion. Certainly they would be bound by his answers if that was the only evidence offered; but in my opinion they would not, in this case, have been so bound by his answers as to be precluded from offering other evidence, though such evidence may be offered to impair the force of his testimony, or even to contradict it. The strict rule applicable to the trial of cases generally, I think, should not be observed in cases of this nature; and if I should confine myself to the record evidence, and the testimony offered in this case (as I believe I must do if I perform my duty properly), then I must say that I see nothing which I believe would

justify me in declaring that the assignee had been improperly influenced to file his application.

It is a grave charge to make against any public officer that he has acted corruptly in the performance of, or when pretending to perform any official duty. Certainly no court should so declare unless such charge should be fairly shown to be true.

The Bank of North Carolina was declared bankrupt in 1868, and the case was, by order of this court, referred to this register. Soon thereafter the meetings of the creditors, provided by law, were held, and Chas. Dewey was duly chosen assignee. Distinguished and able counsel of his own choice were assigned him by the court. Then *nine* years passed by. At the end of that time the estate was not settled; the assets are not fully distributed. It appears to me that it was quite time that some one should inquire why a final settlement had not been made. Must the district judge make that inquiry? I think he might do so without violating any rule of propriety. Could the register, to whose supervision the case had been referred, make this inquiry and even suggest the propriety of some progress—more than that, make some suggestion as to what the assignee should do? I hold that he may properly do all this. Has he done more? If so, it has not been shown.

The motion to expunge the order of sale made by the register in this cause is denied.

## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JANUARY 23, 1879.

**The bankrupts were lessees of the premises in which they carried on business. In June, 1877, they sold to the claimants, by written agreement, for a specified price, the goods and merchandise, including machinery and fixtures used in the business in the aforesaid premises, and including the right to use the premises until May 1, 1878, without further rent or charge, the same being included in the purchase price. The agreement also contained a covenant for peaceable enjoyment. The bankrupts made default in the payment of rent to the landlord, and the claimants were**

ejected in November, 1877. The register assessed their damages for breach of the covenant at the rate of rent payable under the bankrupts' lease. *Held*, Error; that the proper measure of damage was the fair rental value of the building.

## *In re BONNETT, SCHENCK & EARLE.*

*C. M. Marsh*, for claimants.
*H. G. Atwater*, for trustee.

CHOATE, J.—This is a motion to confirm the report of the register assessing the amount of the damages of the petitioners, Wm. J. Stitt & Co., for breach of a contract between them and the bankrupts. June 9, 1877, the bankrupts made a written agreement by which they sold to Stitt & Co., for the gross price of thirteen thousand and five hundred dollars, certain goods and merchandise, including machinery and fixtures used in their business in a building on the corner of College Place and Park Place in this city, and "including the right to the use of said building from the date thereof to the first day of May, 1878, without any further rent or charge whatever, to said Stitt & Co., such rent or charge being included in said purchase price; and we hereby agree to protect them in the full and peaceable enjoyment of said premises until said May 1, 1878."

The full price of thirteen thousand and five hundred dollars was paid to the bankrupts before the commencement of these proceedings in bankruptcy. The bankrupts were lessees of the building, and made default in the payment of rent to their landlord, and Stitt & Co., their sub-tenants, were evicted Nov. 23, 1877. It is for damages on account of this breach of the agreement for their peaceable possession, from Nov. 23d to May 1st, that this claim is made. The register has allowed damages at the rate of the rent payable under the lease of the premises which the bankrupts held. In this I think he is in error. For the injury done to the claimants, by the breach of the agreement, they are entitled to an indemnity. If a certain sum had been paid by them for the rent in advance, then they would be entitled to damages at the same rate, provided there

were no fraud on the landlord's part. This rule of damages in that particular case is settled by authority in the State of New York. (*Mack* v. *Patchin*, 42 N. Y., 167.) The rent so agreed upon is taken to be the value of the term; but this measure of damages being impossible of application in this case, other tests of value of the thing lost must necessarily be resorted to, and evidence should be taken of the fair rental value of the premises. But the rent reserved in a lease of the same premises held by the vendors, and made at an ealier time, cannot afford any proper measure of the claimants to damages. Is it possible that their damages can be any way greater or less than they would have been if the vendors had supposed they owned the building, and the eviction had been by a party claiming a paramount title? Or should the claimants recover less than the actual value of the premises for the period during which they have been deprived of their use, because their vendors may have had the good fortune to secure a lease at a very low rent when real estate was much lower than at the time of the agreement? Or should they receive more than a fair indemnity for their loss, because the vendors may have made their lease at a time when rents were higher than at the time this agreement was made? It is argued that it was within the contemplation of the parties that the bankrupts should apply so much of price received as was the equivalent of the rent reserved in the lease for the residue of the term to the payment of that rent, and thus keep good their covenant of quiet enjoyment, and that therefore it may be presumed that, in finding the gross price, the amount added for rent was equal to what the vendor had to pay. But if any presumption as to intention is to be indulged in, it is that the claimants did not give more nor less for the use of the premises included in the entire price paid than they were then fairly worth, and of this the rent their vendor happened to have stipulated to pay to his landlord constitutes no measure, and cannot be presumed to have been the gauge, though by accident it may have been the equivalent of the estimated rental value.

Report referred back to the register for further proceedings under the order of reference.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

MAY 24, 1879.

There is nothing in the Bankrupt Act which prohibits a debtor from desiring or requesting his creditors to file a petition to have him adjudged a bankrupt when he has committed an act of bankruptcy. The mere fact that he has done so is no objection to a discharge.

In the absence of all fraud, the original adjudication must be considered as final and conclusive upon all the creditors, and cannot be disputed upon the question of granting a discharge.

## *In re ORDWAY BROTHERS*

NELSON, J.—The members of this firm were adjudicated bankrupts, upon their own petition, on the fourth day of August, 1876, and were discharged from their debts under a resolution of composition accepted by their creditors and recorded Sept. 16, 1876. They were again adjudicated bankrupts on the fourth day of September, 1878, upon a petition filed by certain of their creditors. They now ask for their discharge. O. S. Currier, who is the only creditor who has proved a debt against their estate, objects to the discharge, and specifies as the ground of his objection that the second petition, though in form involuntary, was in fact voluntary, and was filed and prosecuted by the petitioning creditors, at the solicitation and procurement of the debtor, for the fraudulent purpose of enabling the debtors to obtain their discharge without the assent, in writing, of any portion of their creditors, and without assets equal to fifty per cent. of the debts.

This objection cannot prevail. There is nothing in the Bankrupt Act which prohibits a debtor from desiring or requesting his creditors to file a petition to have him adjudged a bankrupt, when he has committed an act of bankruptcy. It is a right which the creditors possess, and it cannot be illegal for the debtor to request them to exercise it. It may be that the debtor will derive some advantage under the proceedings which he would not have upon a petition filed by himself, but it would only be an advantage which the law gives to him.

Whether a discharge should be granted without the assent of creditors, if it could be shown that the involuntary petition was filed by collusion between the debtor and petitioning creditors, that the debts of the petitioning creditors were fictitious, or the alleged act of bankruptcy had not been committed, or a fraud had been practised upon the court in obtaining the adjudication, I have no occasion to decide now. That is not this case. In the absence of all fraud, the original adjudication must be considered as final and binding upon all the creditors, and cannot be disputed upon the question of granting the debtor's discharge.

Discharge granted.

## UNITED STATES SUPREME COURT.

### OCTOBER TERM, 1878.

Demands against the Government, if based upon considerations which would be valid between individuals, such as services rendered or goods taken, are property, and will pass to an assignee in bankruptcy, although there be no court to investigate and pass upon their validity, and their recognition and payment may depend upon the caprice and favor of the legislature.

A demand of a bankrupt which is outlawed must go to the assignee.

The Act of Congress of February 26, 1853, to prevent frauds upon the Treasury of the United States, applies only to cases of voluntary assignment of demands against the Government. It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which the act aimed.

## *ROBERT ERWIN v. THE UNITED STATES.*

THE facts appear fully in the opinion.

FIELD, J.—In January, 1873, the appellant brought suit in the Court of Claims, under the Captured and Abandoned Property Act, to recover the proceeds of two hundred and eighty-three bales of cotton, alleged to have belonged to him, and to have been seized and taken from his possession in Savannah, in February, 1865, by the military forces of the United States,

and to have been sold by the agent of the Treasury Department and the proceeds paid into the Treasury. After issue had been joined in the suit, and evidence on behalf of the claimant had been taken, but before a hearing was had, the case of *Haycraft* v. *The United States* (22 Wall., 81) was decided by this court, in which it was held that the Court of Claims had no jurisdiction to hear and determine any claim arising under the provisions of that act, unless suit upon the same was commenced within two years after the suppression of the rebellion. It had been previously decided that within the meaning of the act the rebellion was to be considered as suppressed throughout the whole of the United States on the 20th of August, 1866, the day on which the President, by his proclamation, had declared it suppressed in Texas, the last of the States in insurrection. (*U. S.* v. *Anderson*, 9 Wall., 56.)

Upon learning the decision mentioned, the appellant petitioned Congress for relief, and, in compliance with his petition, a statute was passed, which became a law in February, 1877, authorizing the Court of Claims to take jurisdiction of his claims under the Captured and Abandoned Property Act, "which claims," said the statute, "were, by accident or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said act." (19 Statutes, 509.) After its passage the appellant filed in the Court of Claims an amended petition, setting forth the act and averring that Congress intended by it to confer upon the court jurisdiction to hear and determine his claims, as stated in his original petition.

It appears from the findings of the Court of Claims that in December, 1864, the appellant was possessed of the cotton described in his petition; that it was taken from his possession by the military forces of the United States and sold, and the proceeds thereof paid into the Treasury; that in December, 1868, he was a member of the firm of Erwin & Hardee, of Savannah; that during this month that firm became insolvent, and presented a petition in bankruptcy to the District Court in Georgia; that in due course of proceedings the parties were adjudged

bankrupts; that an assignee of their estate was appointed, and that their property was passed to the assignee. The schedule of the individual property of the appellant annexed to the petition set forth, among his assets, "a claim on the United States Government for three hundred and eighty-two bales of cotton, captured by General Sherman, in Savannah, in December, 1864." In March, 1872, the assignee presented a petition to the judge of the District Court, stating that he had in his possession a great many outstanding debts and demands belonging to the estate of the bankrupts, which could not be collected without inconvenient delay, and praying for leave to sell at auction certain notes and accounts mentioned, among which was this item: "All uncollected open accounts on the books." The court gave the assignee leave to sell at auction "such notes, accounts, and other debts" due to the estate as in his judgment would be for the interest of the creditors of the bankrupts; but as he and the creditors afterwards came to the conclusion that the property, if sold as proposed, would bring a mere nominal amount, no such sale was made, and in December, 1872, he accepted an offer of $2,500, made by the appellant, for the assets, exclusive of the notes of one Henry Schaben. The assets, with that exception, were accordingly sold to him, and a memorandum given him by the assignee acknowledging the receipt of the money "in full for all the remaining assets of the late firm of Erwin & Hardee." It also appears from the findings that the copy of the bankrupts' schedules, prepared by the register in bankruptcy for the use of the assignee, contained a sheet setting forth as an asset the claim mentioned against the United States for three hundred and eighty-two bales of cotton, but that the sheet was removed by some person unknown, and that the assignee had no personal knowledge that such an asset existed when he made this sale to the appellant.

The Court of Claims dismissed the petition of the appellant, and from its decision he appealed to this court.

The purpose of the statute passed for the relief of the appellant, as is manifest on its face, was to remove the bar of the Captured and Abandoned Property Act, which had arisen

without his fault, or rather to confer jurisdiction upon the Court of Claims over his case, which otherwise would not have existed. It was not intended to enlarge or affect his title to the claim, or to change his position in court from what it would have been had he instituted his suit within the two years prescribed by that act. His claim must, therefore, be considered like the claims of other suitors, both in respect to its original validity as a demand against the Government and with respect to his title. If the proof fail in either of these particulars, no recovery can be had.

There is no question made as to appellant's ownership of the cotton at the time of its seizure, or as to its proceeds being in the Treasury of the United States; nor is any point raised against his status in court from his former connection with the rebellion as an officer in the Confederate Army, the disability thus created having been removed by the President's proclamation of pardon and amnesty.

The point in dispute relates to the validity of his title. His contention is, first, that his claim against the United States for the proceeds of the cotton never passed to the assignee in bankruptcy; and, second, that if it did thus pass, he afterwards became the owner of it by purchase of the assets at the sale mentioned.

Upon the first point the argument of the appellant is substantially this: That the claim, at the time the petition in bankruptcy was filed, did not constitute an enforceable demand against the Government, and was not, therefore, in its nature, assignable property; and that if the claim constituted a demand against the Government in the nature of property, it was incapable of assignment under the Act of Congress of February 26, 1853 (10 Stats., 170), and the decision of the court in the Gillis case (95 U. S., 407), and that in either view the appellant stands in his original position before proceedings in bankruptcy were instituted, with his rights or equities respecting such claim unaffected by them.

This argument is unsound. When the appellant filed his petition in bankruptcy, his claim against the Government was

property, though of uncertain value. It was a claim for the proceeds of goods which once belonged to him, and of the possession of which he had been deprived by the action of the Government. Whether this was done rightfully or wrongfully does not affect the character of the claim as property, though it may affect its validity and value. Claims for compensation for the possession, use, or appropriation of tangible property constitute personal estate equally with the property out of which they grow, although the validity of such claims may be denied, and their value may depend upon the uncertainties of litigation or the doubtful results of an appeal to the legislature. A demand of a bankrupt which is outlawed must go to the assignee, for contingencies may arise in many ways which will give value to it. Demands against the Government, if based upon considerations which would be valid between individuals, such as services rendered or goods taken, are property, although there be no court to investigate and pass upon their validity, and their recognition and payment may depend upon the caprice or favor of the legislature.

In *Comegys* v. *Vasse* (1 Peters, 193) this court said, speaking through Mr. Justice Story, that it might in general be affirmed that vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of and adhering to property, will pass by assignment; and it was there held that a claim against the Spanish Government by a bankrupt for damages arising from the capture of vessels and cargoes, of which he was the underwriter, and which were abandoned to him, passed to his assignee in bankruptcy. "The right," said the court, "to indemnity for an unjust capture, whether against the captors or the sovereign, whether remediable in his own courts or by his own extraordinary interposition and grants upon private petition, or upon public negotiation, is a right attached to the ownership of the property itself, and passes by cession to the use of the ultimate sufferer," and is, in its nature, capable of assignment to others. The Bankrupt Act of 1800, under which the case arose, provided that "all the estate, real and personal, of every nature and description, to which

the bankrupt might be entitled, either in law or equity," should go to his assignee; and the court held that the words were broad enough to cover every description of vested right and interest attached to and growing out of property; that under them the whole property of a testator would pass to his devisee, and whatever an administrator could take in case of intestacy would go to him. The language of the act under which the appellant here filed his petition in bankruptcy is equally comprehensive as to the property of a bankrupt which shall go to his assignee. It declares that all his estate, real and personal, and all his rights in equity and choses in action, shall vest in the assignee; and these terms are broad enough to embrace any claim the party may have against the Government for property taken belonging to him. (Revised Statutes, Sections 5044, 5046.)

The Act of Congress of February 26, 1853, to prevent frauds upon the Treasury of the United States, which was the subject of consideration in the Gillis case, applies only to cases of voluntary assignment of demands against the Government. It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees, or assignees in bankruptcy are not within the evil at which the statute aimed; nor does the construction given by this court deny to such parties a standing in the Court of Claims.

Upon the second point, that the claim in controversy was purchased by the appellant at the private sale of the assignee, we think the evidence insufficient. It appears from the copy of the schedules of the bankrupts' property, prepared by the register for the use of the assignee, that the sheet showing the claim against the United States for three hundred and eighty-two bales of cotton had, in some unexplained way, been removed, so that he had no knowledge of the existence of the claim when he sold the remaining assets to the appellant. The receipt given by him shows that he considered that he was selling the assets of the firm only, and not of either of the separate partners. We are clear that it was not his intention to

sell the claim against the Government. There was a want of concurrence of minds to any such transaction, which was essential to give it validity.

Decree affirmed.

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## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

FEBRUARY 20, 1879.

District Courts have jurisdiction, under Sec. 4979, of a suit by or against an assignee whenever he is a necessary and proper party, although other persons may be joined.

About six months prior to the commencement of the proceedings in bankruptcy, the bankrupt made a voluntary assignment. Plaintiff was afterwards, and before the filing of the petition, appointed receiver of the bankrupt in certain proceedings supplementary to execution in the State Court. In a suit brought against the bankrupt, the voluntary assignee and the assignee in bankruptcy to set aside the voluntary assignment, as void under the State law for non-compliance with the statutory requirements and as void as to creditors on the ground that it was void in fact, *Held*, That the District Court had jurisdiction; that the receiver was a person claiming an adverse interest within the meaning of the statute; that the assignment, being one void in fact or by force of express statute, was not within the limitation of three months, and the property covered thereby and in which such interest was claimed was "property transferrable to or vested in the assignee;" and that all persons having an interest therein to be affected by the decree were properly joined as defendants.

## *JAMES B. OLNEY, receiver, &c.*, v. *WILSON P. TANNER et al.*

THE facts appear fully in the opinion.

*J. I. & F Werner*, for defendants.
*Norwood & Coggeshall*, for complainants.

CHOATE, J.—This is a demurrer to a bill in equity. The complainant is the receiver, appointed August 15, 1877, in supplementary proceedings upon an execution issued under a judgment recovered by one Seaman, against the defendant Swartwout. A petition in bankruptcy was filed against Swartwout, September 11, 1877, on which there has since been an

adjudication, and the defendant Sayre has been appointed his assignee in bankruptcy. March 28, 1877, Swartwout made a voluntary assignment to the defendant Tanner of personal and real property, nominally for the benefit of his creditors, which assignment the bill alleges to be actually void, under the laws of New York, for non-compliance with certain requirements of statute, and also void as against creditors, on the ground that it was void in fact.

The bill is brought against the bankrupt, his assignee in bankruptcy, and the voluntary assignee, and seeks to have the voluntary assignment declared void, and to have the property applied to the satisfaction of the judgment under which the complainant was appointed receiver. The bill now demurred to is an amended bill. The original bill was demurred to, and the point especially relied upon by the defendants was that, under Section 4979, this court has jurisdiction of a suit by or against an assignee only where the assignee is sole plaintiff or sole defendant; and the demurrer was overruled on the ground that such was not the true construction of the statute, but that the jurisdiction was granted whenever the assignee was a necessary or proper party to such a suit and was a party, although other persons might be joined. While there are some *dicta* of the courts possibly sustaining the view of the statute contended for by the defendants' counsel in this respect, the evident purpose of the grant of jurisdiction, as well as the language used, clearly requires the other construction. The evident purpose of the enactment was to secure to assignees the right to have controversies between themselves, as assignees, and parties claiming adversely to them, determined in the Federal Courts. And this is equally an important right or privilege, if, from the nature of the controversy, there happens to be some other person who, as well as the assignee, is a necessary or proper party to the full determination of the same controversy. Nor is there, as it seems to me, the same reason for a restrictive construction of this act in this respect as existed with reference to the statutes giving jurisdiction to the Federal Courts on the ground of the citizenship of the parties.

The point chiefly urged in support of the present demurrer is, that this is not a suit by a party claiming an adverse interest touching property or rights transferable to or vested in the assignee; that it is, in fact, a suit by a creditor claiming a lien on the property of the bankrupt to enforce that lien, and that no such suit will lie, because, pending the question of the discharge, no creditor can sue the bankrupt, and because no person but the assignee can sue to recover property fraudulently assigned by the bankrupt; and defendant's counsel cites and relies on the case of *Glenny* v. *Langdon*, decided in the Supreme Court of the United States at the present term. (19 N. B. R., 24.) That case is conclusive that no creditor can, after the appointment of the assignee, maintain a suit to set aside a fraudulent assignment, even though the assignee refuses to proceed to recover the assigned property, vested in the assignee by force of the Bankrupt Law, as property assigned in fraud of creditors; that the creditors' remedy is in the Bankrupt Court, to sue or to procure his removal for misconduct. A creditor, even though he has a lien acquired before the bankruptcy, is not—it may well be conceded—a person claiming an adverse interest within the meaning of this section of the statute, and the rights of creditors in respect to such liens are otherwise carefully provided for in the statute, and certainly a suit against the bankrupt and his assignee, without leave of the Bankrupt Court, is not the remedy appointed for him by the statute. This, however, is not the case of a creditor suing to enforce a lien, although the ultimate result of the suit may be the satisfaction of a lien which the creditor has acquired. Upon the appointment of a receiver by authority of a court of competent jurisdiction, the *title* to the property of which he is appointed receiver vests in him in trust. (*Porter* v. *Williams*, 9 N. Y., 142.) While further proceedings may be necessary to actual manual possession of it, he has instantly something more than a lien; he has the title. (See *Sedgwick* v. *Menck*, 1 N. B. R., 675.) This was, on the averments of the bill, the state of facts at the commencement of the bankruptcy proceedings, and it seems to me that the receiver is a person

claiming an adverse interest within the meaning of the statute. It remains to consider whether the property in which he claims this interest is "property transferable to or vested in the assignee." The bill states a case of an assignment void for fraud in fact, or void by force of express statute; it is, therefore, not within the limitation of three months, which applies to the right of the assignee to avoid a transfer merely void as against the Bankrupt Law. But for the appointment of the receiver, therefore, the title to the property would have vested in the assignee in bankruptcy; and as the receiver's title is in trust for the satisfaction of a particular debt, and, as to any surplus, first for the creditors generally, and then for the debtors, there seems to be an equitable interest in the property which passed under the Bankrupt Law to the assignee. As the trust under which the receiver holds the property cannot be performed except by a sale of the property under decree of the court, all parties having an interest therein to be affected by such decree, among whom is the assignee, are properly joined as defendants in the suit.

Demurrer overruled, with leave to answer on payment of costs.

## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

APRIL 10, 1879.

The bankrupt was the executor of one L., and as such received the sum of eleven thousand three hundred and twenty dollars. Less than four months before the filing of the petition in bankruptcy he made and procured to be recorded a mortgage for that amount on his real estate to himself as executor. Afterwards a prior mortgage was foreclosed, and on the reference as to surplus moneys the assignee and the bankrupt, as executor, appeared and contested with each other the right to such surplus. The referee found that the mortgage was executed in fraud of the bankrupt law, and was void as to the assignee and creditors of the bankrupt. The referee's report was confirmed, and the surplus moneys paid to the assignee. The bankrupt, as executor, afterwards filed a proof of claim in the bankruptcy proceedings for the sum of eleven thousand three hundred and twenty dollars, which stated that the debt had been secured by mortgage which had become worthless by the foreclosure, and stated that the lien of the mortgage was deemed cancelled and abandoned.

In re Dakin.

On motion the proof was expunged by the register. *Held*, No error; that the question of the validity of the mortgage was properly before the referee, and the final decree of the court confirming his report was a determination of the question binding and conclusive upon the claimant; that the recovery of the surplus moneys by the assignee in the foreclosure proceedings was equivalent to a recovery of the property from the preferred creditors in an action brought for that purpose; that there was no voluntary surrender by the claimant, and that he could not prove for any part of his debt.

## *In re DANIEL J. DAKIN.*

THE facts appear fully in the opinion.

*O. D. M. Baker*, for assignee.
*John P. H. Tallman* and *A. H. Wilkinson*, for claimant.

CHOATE, J.—This is a review of the order of the register expunging a proof of debt. The facts are as follows: November 11, 1867, the bankrupt Dakin, as executor of the will of Louisa A. Sturgess, received eleven thousand three hundred and twenty dollars, the proceeds of her estate. July 5, 1877, a petition in bankruptcy was filed against him by creditors, on which he was adjudicated September 19, 1877. An assignee was afterwards appointed. On the 8th of May, 1877, the bankrupt caused to be recorded a mortgage on real estate belonging to him, from himself individually to himself as executor under the will of Louisa A. Sturgess, for eleven thousand three hundred and twenty dollars. The mortgage was dated May 7, 1877. In December, 1877, William T. Merritt, as executor of Hannah K. Merritt, commenced a suit in the New York Supreme Court for the foreclosure of a prior mortgage on the same real estate. He made the assignee in bankruptcy and Dakin, as executor, parties to the suit, and they appeared therein. Judgment of foreclosure having been given, the property was sold under the decree, and a reference was ordered to ascertain and report the amount due to Dakin as executor, and to any other person, which is a lien on the surplus moneys, and the priorities of the several liens thereupon. The assignee in bankruptcy and Dakin, as executor, appeared before the referee and contested with each other the right to the surplus moneys. April

15, 1878, the referee reported that the surplus was three thousand two hundred and nineteen dollars and sixty-eight cents; that the bankrupt was indebted to himself, as executor, eleven thousand three hundred and twenty dollars; that when he executed the mortgage he was insolvent, and knew himself to be so; that he executed with intent to prefer the debt he owed to said trust estate, and with a view to prevent his property from coming to his assignee in bankruptcy, and to prevent the same from being distributed under the Bankrupt Law, and to evade the provisions thereof. And he found, as a conclusion of law, that the mortgage was executed in fraud of the provisions of the Bankrupt Law, and was void as to the creditors and assignee in bankruptcy of said Dakin. April 27, 1878, the report was confirmed on motion and notice, and a decree entered that said surplus moneys, after deducting a prior dower claim and costs, be paid over to the assignee in bankruptcy. The surplus money thus ascertained, two thousand eight hundred and thirty-five dollars and eighteen cents was paid to the assignee.

July 25, 1878, Dakin, as executor, etc., filed with the register his proof of claim against the bankrupt's estate for eleven thousand three hundred and twenty dollars. The proof stated that the debt had been secured by said mortgage when it had become worthless by the foreclosure, and it contained the statement that "it" (the lien of the mortgage) "is hereby deemed cancelled and abandoned." The assignee moved to expunge the claim, and the register so ordered. This proceeding is to review this decision of the register.

It is insisted by the assignee that the claimant is precluded from the proof of his debt by reason of the determination in favor of the assignee in the surplus money proceeding, which is, as he claims, equivalent to a hostile proceeding on the part of the assignee to recover the property which was transferred to the claimant by way of preference. That therefore Rev. Stat., Sec. 5084, which prohibits a creditor who has received a fraudulent preference from proving his debt unless he surrenders the property so received to the assignee, bars the claimant from the proof of this debt. The claimant insists that there was no

question properly before the referee, except that of the *priority of liens;* that the referee or the Supreme Court had no jurisdiction nor authority to determine in that special proceeding that the claimant's mortgage was void as in violation of the provisions of the Bankrupt Law. I think that the register was clearly right in holding that the question of the validity of the claimant's mortgage was properly before the referee, and that the final decree of the court confirming his report was a determination of this question binding and conclusive upon the claimant. While it is doubtless competent and proper and not unusual, where there is a disputed question of fact involved in the right to surplus moneys, to direct the determination of the right by *an action*, yet I think the better opinion is that a Court of Equity in a suit for foreclosure has full power and jurisdiction to determine finally the rights of all parties interested in the property who are parties to the suit, and that where, upon the reference to ascertain and report the priority of liens upon the surplus moneys, parties claiming rights therein adversely to each other actually appear and litigate the question of their respective rights therein, and this, too, without objection on their part to the determination in that way of the question so raised and litigated, and the determination so made is, on notice and hearing, confirmed by a decree of the court, the determination so made is final and conclusive unless appealed from, like any other judicial determination. (*Life Ins. Co.* v. *Bowen*, 47 Barb., 618; *Eagle Fire Ins. Co.* v. *Flanagan*, 1 How. Ct. App. Cas., 303; *Livingston* v. *Meldrum*, 19 N. Y., 440; *Field* v. *Hauxhurst*, 9 How. Pr., 72; *Union Ins. Co.* v. *Rensselaer*, 4 Paige, 85; *King* v. *West*, 10 How. Pr., 333; *Husted* v. *Dakin*, 17 Abb. Pr., 137; *Union Dime Bank* v. *Osley*, 4 Hun, 657.)

The determination of the invalidity of the claimant's mortgage as against the assignee is therefore to be deemed as having been made by the judgment of a court of competent jurisdiction upon a trial on the merits. It is *res adjudicata.* While there has been some conflict of opinion in the courts of New York on the practice in such cases, and proper limits of

the inquiry to be made upon such reference, yet I do not think the authorities sustain the position that the court has not jurisdiction to determine such a question, or that in a case like the present the parties would not be bound. (See *Matthews* v. *Duryee*, 3 Abb. Ct. App. Cas., 220.)

On the further question, whether the claimant has surrendered his security or may now claim the right to prove his debt without such surrender, the security having proved worthless in his hands, having, in fact, been taken from him by the judgment of the court in the foreclosure suit, no distinction can be made between this case and the ordinary case of a recovery of the property from the preferred creditors by the assignee by means of an action brought for that purpose. In substance and effect this is what the assignee has done. The prohibition of the Statute, Sec. 5084, was not made with reference to any peculiar form of proceeding, nor is it limited in its application to cases where an action at law or suit in equity is brought by the assignee to recover the property. Although this proceeding to determine the right to surplus money is a special proceeding in an equity suit in which another party is the plaintiff, yet in this special proceeding the preferred creditor and the assignee contested with each other the right to the property which was the subject of the preference as clearly as if it had been an action brought to recover that alone, and the assignee prevailed and recovered the property. The case is within both the letter and the spirit of the statute, and the register properly held that the claimant had not voluntarily surrendered the property, but that it had been recovered from him by the assignee by legal proceedings. (*In re* Leland, 9 N. B. R., 209.) This precludes the proof of the debt, and it has also been held that where there has not been a surrender of the property to the assignee before recovery, the creditor cannot prove even for a moiety of this debt under the amendment to Section 39 of the Bankrupt Law, contained in the Twelfth Section of the Act of January 22, 1874 (18 Stat., p. 181), which provides that a preferred creditor, in case of actual fraud, shall not be allowed to prove for more than a moiety of his debt. In the case of *In*

*re* Atkins in this court (unreported), Judge Blatchford held that this amendment was a limitation upon the section, the amendment not giving a preferred creditor any new rights or any right to prove at all if he failed to surrender the property, but restricting him, in a case of actual fraud to the proof of a moiety in case under Section 23 (R. S., 5084), he had by surrender of the property entitled himself to prove at all.

It is argued on behalf of the claimant that the moneys of the estate of Louisa A. Sturgess were invested by Dakin in the real estate on which this mortgage was given, and that they may be traced into and identified with the surplus moneys which resulted from the foreclosure; and that he is now entitled to an order that the whole of such surplus be paid to him as executor, and can prove for the balance of eleven thousand three hundred and twenty dollars. It appears by the evidence that after Dakin received this money in 1867 he bought Government bonds with about eight thousand dollars of it. What he then did with the rest does not appear, except that he mingled it with his own money. Afterwards he sold the bonds, and the proceeds of these were not kept distinct from his other moneys. Somewhere from 1871 to 1874 he expended a large sum of money, exceeding eleven thousand three hundred and twenty dollars, in putting up buildings on the real estate in question; but there was no act done at the time or afterwards by him declaring or creating any trust for the benefit of the trust estate in the land, or any declaration or act indicating that the making of these improvements was an investment of the trust funds. The beneficiaries under the will were the two children of the testatrix, and before they came of age he promised them, or one of them, that he would, when they came of age, give them security. His giving of the mortgage appears to have been intended by him as a compliance with this promise.

No case is cited which would justify the court in holding that these facts show that the trust funds were invested in this real estate so as to fasten on the land a trust, or that the surplus moneys can be identified as part of the trust moneys, as dis-

tinguished from the other moneys of Dakin which went into the land; certainly the case of *Cook* v. *Tullis* (9 N. B. R. 433, 18 Wall., 332) does not sustain this claim. I think, however, that this question cannot properly be raised upon the present record. The claim is obviously entirely inconsistent with that made in the proof of claim now in question. That proceeds on the theory that there was no investment of the trust money; that it is now in its entirety a mere debt for which the mortgage was given as security. Even if this claim of an investment of the proceeds can be sustained, the decision of the register must be sustained. It is not therefore necessary to determine whether there is any foundation for this claim, or whether the giving of the mortgage itself, or the proceedings of the executor in the foreclosure suit would estop him now from making such a claim. Such questions must be reserved till he shall make an application to have that money paid to him, if he shall be so advised.

Order of the register confirmed.

## UNITED STATES SUPREME COURT.

### OCTOBER TERM, 1878.

Vested rights *ad rem* and *in re*—possibilities coupled with an interest and claims growing out of property—pass to an assignee in bankruptcy. The right to indemnity for the unjust capture or destruction of property, whether the wrongdoer be a government or an individual, is clearly within this category.

Where the necessary parties are before a Court of Equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the court. It has the power to compel the defendant to do all things necessary according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him.

The limitation contained in Section 5057 relates only to suits by or against the assignee with respect to parties other than the bankrupt.

The bankrupt, who was a British subject, held a claim against the United States for cotton burned during the war, which was marked on his schedule as worthless, and was sold for twenty dollars to W., who purchased it with the other assets at the request of the bankrupt and with money furnished by him. Some years later an award was made by the commission sitting under the treaty between the United States and Great Britain for

the payment of one hundred and eighty-seven thousand one hundred and ninety dollars on this claim. *Held*, That the sale to W. was invalid.

## *THOMAS I. PHELPS, Assignee*, v. *A. R. McDONALD and WILLIAM WHITE.*

APPEAL from the Supreme Court of the District of Columbia.

The facts appear fully in the opinion.

SWAYNE J.—This is an appeal in equity from the Supreme Court of the District of Columbia. The case was decided in that court upon a demurrer to the bill and amended bill of the complainant. The demurrer was sustained and the bills were dismissed. The complainant is the appellant, and the action of the court below is brought before us for review.

The demurrer admits the facts alleged. The question is only as to their sufficiency to entitle the appellant to the relief which he seeks. Without reproducing the case in detail as it is in the record, we shall address ourselves to the salient points which it presents for our consideration.

A chose in action lies at the foundation of the controversy. It is thus described by McDonald, in the schedule of his assets filed with his petition in bankruptcy: "Claim against Genl. Osborne, of U. S. Army, and others, for burning, in January or February, 1865, from one thousand to two thousand bales of my cotton, in Arkansas and Louisiana."

The late Bankrupt Law provided that as soon as an assignee was appointed, the judge or register should convey to him "all the estate, real and personal, of the bankrupt." (Rev. Stat., Sec. 5044.) And that there should vest in the assignee, among other things, all the bankrupt's "rights of action for property, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking, or detention, or injury to" his property.

*Comegys et al.* v. *Vasse* (1 Pet., 193) has an important bearing upon this case. That case arose under the Bankrupt Law of April 4, 1800. (2 Stat. U. S., 19, Ch. 19.) The 5th and 6th

Sections authorized the commissioners to convey to the assignees "all the real and personal estate, of every nature and description, to which the said bankrupt may be entitled, either in law or equity, in any manner whatsoever."

Under this act Vasse was declared a bankrupt, and received his certificate of discharge. He had been an underwriter, and as such received from those whom he had insured and indemnified assignments of their claims against France, Great Britain, and Spain. In his return of his effects to the commissioners, pursuant to the statute, he named the claims against France and England, but not the claim against Spain. The omission was supposed to have been honestly made, because there was then not the slightest *spes recuperandi* with respect to that country. The claim was regarded as hopelessly worthless.

More than twenty years later, under a treaty between Spain and the United States, an award was made for its payment. There, as here, the money was demanded by the bankrupt and by his assignees, and the same lines of argument to which we have listened in this case were pursued by the counsel in that case with consummate learning and ability. The judgment of the court was delivered by Mr. Justice Story. It sustained the demand in behalf of the creditors, and is exhaustive and conclusive.

It is needless for us in this case to go over the same field of discussion. A few remarks, however, grounded chiefly upon that authority, will not be out of place. It will be observed that the claim against Spain, and the claim against the United States, here in question, rested upon the same foundation, and that each was surrounded by like circumstances.

There is no element of a donation in the payment ultimately made in such cases. Nations, no more than individuals, make gifts of money to foreign strangers. Nor is it material that the claim cannot be enforced by a suit under municipal law which authorizes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly upon his will and pleasure. The theory of the rule is that the govern-

ment is always ready and willing to pay promptly whatever is due to the creditor. It is but a short time since our government could be sued, and it can be done now only under the special circumstances defined by the statute. It is enough that the right exists when the transfer is made, no matter how remote or uncertain the time of payment. The latter does not affect the former. Nor has an adverse decision any final effect. If the demand be just and recognized as valid by the law of nations, the claimant, or his government, if the latter choose to do so, may still press it upon the attention of the alien government.

If the thing be assigned, the right to collect the proceeds adheres to it and travels with it whithersoever the property may go. They are inseparable. Vested rights *ad rem* and *in re*—possibilities coupled with an interest and claims growing out of property—pass to the assignee. The right to indemnity for the unjust capture or destruction of property, whether the wrongdoer be a government or an individual, is clearly within this category. (*Erwin* v. *U. S.*, 19 N. B. R. 172.) The register's deed in this case bears date on the 12th of February, 1869. The title then became vested in the appellant. Thereupon he stood in the place of McDonald, and was clothed with all the rights which had belonged to the bankrupt before he became such. On the 25th of September, 1873, within less than five years after the assignment, an award was made by the mixed commission, sitting under the treaty between United States and Great Britain, for the payment of one hundred and eighty-seven thousand one hundred and ninety dollars in satisfaction of the claim.

In the light of these considerations it would be sheer fatuity to deny the substantial character and value of the claim at the time of the transfer by the register's deed.

But it is insisted that the alleged sale under the order of the District Court divested the title of the assignee.

According to the bill the order was to sell "certain accounts, notes, judgments, etc." The exhibit referred to as containing "copies of the petition, order, and report of the sale"

is not in the record. Whether the order was broad enough to include the claim in question, and whether the report showed that it was sold, are questions which, in the state of the record as it is before us, we are unable to determine. Doubts in such cases are to be resolved against the pleader. But if the affirmative be conceded as to both these points, a fatal objection still remains. McDonald went into voluntary bankruptcy. His petition did not disclose that he was a British subject. We have given the description of the claim in the schedule filed with his petition. It was brief and vague and gave no definite information. In a duplicate schedule filed with the register he pronounced it "*worthless.*" In assigning to him exempted property, the register and assignee unite in saying: "No other exemptions made, because there are no assets, except some old claims which upon the face called for large amounts, and upon inquiry I find them totally or entirely worthless." He failed to make known that he bought the cotton under a permit from the Treasury Department, accompanied with an order from the President directing the officers of the army and navy to aid him in getting it beyond the lines of the insurgent territory, and that it was lost to him by reason of a sudden and unexpected change in the legislation of Congress, thus creating as strong an equity in his favor against the United States as could well exist.

His memorial to the mixed commission was sworn to on the 25th of November, 1871. In that document his losses are stated with fulness and particularity. It is in striking contrast with the meagreness of the schedules. When there had been a transfer of the claim, the rules of the commission provided that "the mode and manner of such transfer must be stated." The memorial was silent upon this subject. This asset—soon to realize nearly two hundred thousand dollars—was sold for twenty dollars! The amended bill avers and the demurrer admits that "the said White, at the sale of assets in the bill mentioned, purchased the same at the request of said McDonald, and with money furnished by him."

Such is the case touching the point in hand, as it is pre-

sented by the demurrer of the appellees to the allegations of the complainant. Considering the sale in the light of this showing, we cannot hesitate to hold it invalid. We are not unmindful that the question may come again before the lower court, and perhaps before this court, upon the answers of the appellees and the testimony adduced by the parties, and that it may then be the hinge of the controversy. It is our purpose in such case to leave both courts unfettered by anything in this opinion, and in all respects as free to decide, one way or the other, as if the subject had not been before considered by either tribunal.

The Bankrupt Law required that all suits by or against the assignee should be brought within two years from the time the cause of action accrued. (Rev. Stat. U. S., 982, Sec. 5057.)

But this provision relates to suits by or against the assignee with respect to parties other than the bankrupt. In a case like this it has no application. If this were otherwise, the cause of action here did not accrue until the award was made and McDonald set up a claim to the fund awarded. (*Clark* v. *Clark*, 17 How., 315.)

Lastly, it is said that the suit is in effect a suit against the British government, and that hence the court below had no jurisdiction of the case.

In *Clark* v. *Clark* (*supra*), where the contest was between the bankrupt and his assignee, touching a fund in the Treasury derived from a foreign government, the secretary, though not a party, was enjoined from paying it over until the rights of the contestants were settled in the suit then pending.

In *Milner et al.* v. *Metz* (16 Pet., 227), also, the fund in controversy was in the Treasury. The secretary refused to recognize the claim of either party, and left them to adjust the conflict by a judicial determination. The contest was ended by a decree in the court below, which was affirmed by this court, perpetually enjoining one of the parties from receiving the money.

This objection assumes facts which have no existence. The British government is in no wise, either in form or substance,

*In re* Bonnett, Schenck & Earle.

The bankrupts were lessees of the premises in which they carried on business. In June, 1877, they sold to the claimants, by written agreement, for a specified price, the goods and merchandise, including machinery and fixtures used in the business in the aforesaid premises, and including the right to use the premises until May 1, 1878, without further rent or charge, the same being included in the purchase price. The agreement also contained a covenant for peaceable enjoyment. The bankrupts made default in the payment of rent to the landlord, and the claimants were ejected in November, 1877. The register assessed their damages for breach of the covenant at the rate of rent payable under the bankrupts' lease. *Held*, Error; that the proper measure of damage was the fair rental value of the building. 168

*In re* Ordway Brothers.

There is nothing in the Bankrupt Act which prohibits a debtor from desiring or requesting his creditors to file a petition to have him adjudged a bankrupt when he has committed an act of bankruptcy. The mere fact that he has done so is no objection to a discharge.

In the absence of all fraud, the original adjudication must be considered as final and conclusive upon all the creditors, and cannot be disputed upon the question of granting a discharge. 171

Erwin *v.* The United States.

Demands against the Government, if based upon considerations which would be valid between individuals, such as services rendered or goods taken, are property, and will pass to an assignee in bankruptcy, although there be no court to investigate and pass upon their validity, and their recognition and payment may depend upon the caprice and favor of the legislature.

A demand of a bankrupt which is outlawed must go to the assignee.

The Act of Congress of February 26, 1853, to prevent frauds upon the Treasury of the United States, applies only to cases of voluntary assignment of demands against the Government. It does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evil at which the act aimed. 172

Olney, receiver, *v.* Tanner *et al.*

District Courts have jurisdiction, under Sec. 4979, of a suit by or against an assignee whenever he is a necessary and proper party, although other persons may be joined.

About six months prior to the commencement of the proceedings in bankruptcy, the bankrupt made a voluntary assignment. Plaintiff was afterwards, and before the filing of the petition, appointed receiver of the bankrupt in certain proceedings supplementary to execution in the State Court. In a suit brought against the bankrupt, the voluntary assignee and the assignee in bankruptcy to set aside the voluntary assignment, as void under the State law for non-compliance with the statutory requirements and as void as to creditors on the ground that it was void in fact, *Held*, That the District Court had jurisdiction; that the receiver was a person claiming an adverse interest within the meaning of the statute; that the assignment, being one void in fact or by force of express statute, was not within the limitation of three months, and the property covered thereby and in which such interest was claimed was "property transferrible to or vested in the assignee;" and that all persons having an interest therein to be affected by the decree were properly joined as defendants. 178

*In re* Daniel J. Dakin.

The bankrupt was the executor of one L., and as such received the sum of eleven thousand three hundred and twenty dollars. Less than four months before the filing of the petition in bankruptcy he made and procured to be recorded a mortgage for that amount on his real estate to

himself as executor. Afterwards a prior mortgage was foreclosed, and on the reference as to surplus moneys the assignee and the bankrupt, as executor, appeared and contested with each other the right to such surplus. The referee found that the mortgage was executed in fraud of the bankrupt law, and was void as to the assignee and creditors of the bankrupt. The referee's report was confirmed, and the surplus moneys paid to the assignee. The bankrupt, as executor, afterwards filed a proof of claim in the bankruptcy proceedings for the sum of eleven thousand three hundred and twenty dollars, which stated that the debt had been secured by mortgage which had become worthless by the foreclosure, and stated that the lien of the mortgage was deemed cancelled and abandoned. On motion the proof was expunged by the register. *Held*, No error; that the question of the validity of the mortgage was properly before the referee, and the final decree of the court confirming his report was a determination of the question binding and conclusive upon the claimant; that the recovery of the surplus moneys by the assignee in the foreclosure proceedings was equivalent to a recovery of the property from the preferred creditors in an action brought for that purpose; that there was no voluntary surrender by the claimant, and that he could not prove for any part of his debt. 181

Phelps, assignee, *v.* McDonald *et al.*

Vested rights *ad rem* and *in re*—possibilities coupled with an interest and claims growing out of property—pass to an assignee in bankruptcy. The right to indemnity for the unjust capture or destruction of property, whether the wrongdoer be a government or an individual, is clearly within this category.

Where the necessary parties are before a Court of Equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the court. It has the power to compel the defendant to do all things necessary according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him.

The limitation contained in Section 5057 relates only to suits by or against the assignee with respect to parties other than the bankrupt.

The bankrupt, who was a British subject, held a claim against the United States for cotton burned during the war, which was marked on his schedule as worthless, and was sold for twenty dollars to W., who purchased it with the other assets at the request of the bankrupt and with money furnished by him. Some years later an award was made by the commission sitting under the treaty between the United States and Great Britain for the payment of one hundred and eighty-seven thousand one hundred and ninety dollars on this claim. *Held*, That the sale to W. was invalid. 187

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# SYNOPSIS OF CASES, No. 5.

*In re* Thomas R. Brinker et al.

An assignee cannot, without permission of the court, make an agreement with an attorney employed by him to conduct a suit by which the fees of the latter are to be contingent on the result of the suit.

The Bankrupt Court has power to determine in a summary manner the question as to the proper amount to be allowed as fees to an attorney employed by the assignee, and to order the attorney to pay over the balance of moneys retained by him for his services. 195

*In re* J. L. Scoggin.

Under Section 1012 of the Oregon Civil Code an attorney cannot acquire a lien for his compensation upon a judgment obtained by him unless he has a special agreement as to the amount thereof.

A mere debt due by the adverse party to the client of the attorney is not money in the hands of such party within the meaning of subdivision three of said Section 1012, and therefore no lien can be acquired upon it for the compensation of the attorney who may obtain a judgment therefor. 197

*In re* Alanson H. Tifft.

Any District Court in the United States may, in the exercise of its ancillary jurisdiction and in aid of the court in which the proceedings are pending, grant injunctions, stay proceedings, enforce the provisions of composition resolutions, or administer other summary relief as a court in bankruptcy, as to persons or property within the district, if the relief sought is such as the court in which the proceedings are pending would grant if the persons or property to be affected were within reach of the process of that court, provided that court is disabled from giving the same relief by reason of the persons or property not being subject to its process.

After the filing of a petition in bankruptcy no creditor can acquire a lien by attachment, judgment and levy, or otherwise on the property of the debtor which belonged to him at the time of the filing of the petition. The commencement and pendency of composition proceedings makes no difference in this respect, and gives the creditor no right to obtain a lien which he would not otherwise have had.

The bankrupt, on February 11, 1878, filed a voluntary petition, and also a petition in composition in the U. S. District Court for the Eastern District of N. Y. The composition was duly accepted, and was confirmed and ordered to be recorded on May 21, 1878. The bankrupt was adjudicated April 18, 1878, but no assignee was appointed. After the petition was filed, a creditor residing in the Eastern District of N. Y., whose name and address and the amount of whose debt appeared on the schedule, commenced an action against the bankrupt, and caused an attachment to be issued to the Sheriff of the City and County of New York, who thereupon attached certain goods in the store of the bankrupt. Judgment was rendered in said action in favor of the creditor on the 18th of April, 1878, and an execution was on the same day issued to said sheriff, who levied on the goods attached. On an application for an injunction to stay the sale, *Held*, That the creditor acquired no lien on the property by his attachment, judgment, and levy; that the case was clearly one in which the Court of the Eastern District would stay proceedings if the officer were within that district; that while this court could not restrain the creditor because it was a resident and within reach of the process of the Court of the Eastern District, yet an injunction staying the proceedings of the sheriff until the question of the bankrupt's discharge shall be determined was within the power of the court and should be granted. 201

a party to the record, and no final or coercive judicial action is sought except with respect to McDonald and White. In the progress of the case below, George W. Riggs, Esq., was appointed receiver, with authority to collect the fund. Of course he could do nothing without the voluntary concurrence of the just and eminent British agent, who was in possession. By consent of parties the fund was delivered to the receiver, and in the final decree, brought here for review, he was directed to pay it over to the appellees, less certain charges and expenses incurred in procuring the award, and he was thereupon to be discharged from his office. We have heard no objection from any quarter to the placing of the fund in the hands of the receiver. Certainly none has been suggested in behalf of the sovereignty whose rights are said to have been invaded.

But suppose, as has been suggested, that the money were in the British exchequer, at the seat of the home government, still the court below had jurisdiction of the parties and of the cause and an important duty to perform.

Such commissions as that which made the award here in question usually decide only as to the validity of the claim and the amount to be paid. It is rarely, if ever, within their jurisdiction to decide to whom the claim belongs and hence is entitled to receive the money. They have no means of compelling the attendance of parties or witnesses, no rules of pleading or procedure applicable to such a case, and the foreign element in the tribunal, at least, cannot be supposed to have any knowledge of the law according to which the question is to be determined. The validity of the claim depends upon the law of nations; its ownership upon the local jurisprudence where the transfer is alleged to have been made.

Hence, *Comegys* v. *Vasse*, *Clark* v. *Clark* (*supra*), and other like cases have arisen, involving conflicting claims to the fund awarded, and nothing else.

In this case, whether the money be here or abroad, the assignee is entitled to have the question finally settled, whether he or McDonald has the better right. This court has twice decided that a British subject can sue the United States in the

Court of Claims, because an American citizen is permitted to sue the British government by a petition of right. The act of Congress creating the court requires reciprocity. (*U. S.* v. *O'Keefe*, 11 Wall., 178; *Carlyle* v. *The U. S.*, 16 id., 178.)

If the claim of the assignee were presented to the British government by a petition of right, and the claim of McDonald were also presented, the parties, in the absence of any judicial determination, would doubtless be required to settle their controversy by interpleading, or in some other appropriate form of litigation. If the appellant shall be finally successful in this case, and the record should be presented with his petition, no such question could arise, and judgment in his favor must necessarily follow. Conceding the fund to be there, why should not this question of paramount right be settled in this case, rather than that the American claimant should be subjected to the delay, expense, and other inconveniences of a suit before a foreign tribunal? The adjudication would be as binding in one case as in the other.

Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily, to give full effect to the decree against him.

Without regard to the situation of the subject-matter, such courts consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*. (2 Story's Eq., Sec. 899; *Miller* v. *Sherry*, 2 Wall., 249; *Penn* v. *Lord Baltimore*, 1 Vesey, Sr., 444; *Mitchell* v. *Bunch*, 2 Paige, 606.)

The decree of the court below is reversed, and the cause will be remanded with directions to proceed in conformity to this opinion.

MILLER, J., dissenting.—The treaty under which the award was made, which is the subject-matter of this suit, provides

for the payment to Great Britain of claims for injury to British subjects, and the award in this case in express terms orders the money to be paid to the agent of that government in this country. The case of *Comegys* v. *Vasse*, and *Clark's case*, cited in the opinion, are cases of awards made in *favor* of the United States for the use of *her citizens*.

While the money so awarded is properly a fund within the jurisdiction of our courts, as are also our own citizens, I do not think those courts have any control over the British government or its agents in the distribution of the fund awarded to them.

It does not appear from anything in the record, as I read it, that the fund in controversy has ever been voluntarily paid into court by the agent of that government. It is an indelicate attempt by the courts of this country to seize *in transitu* for its own citizens what by treaty this government has agreed to pay to another government for its subject.

I, therefore, dissent from the judgment of the court, and my brother Field concurs with me in the matter.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JANUARY 16, 1879.

An assignee cannot, without permission of the court, make an agreement with an attorney employed by him to conduct a suit by which the fees of the latter are to be contingent on the result of the suit.

The Bankrupt Court has power to determine in a summary manner the question as to the proper amount to be allowed as fees to an attorney employed by the assignee, and to order the attorney to pay over the balance of moneys retained by him for his services.

## *In re THOMAS R. BRINKER et al.*

THE facts appear fully in the opinion.

*F. E. Blackwell*, for assignee.

*R. H. Chittenden*, for attorney.

CHOATE, J.—This is a motion to compel the payment to the assignee of the sum of three hundred and twenty dollars, al-

leged to be improperly retained by his attorney, who received the same, in his capacity as attorney for the assignee, in a suit in a State Court.

The assignee, having accounted for all the money received except the sum of four hundred and seventy dollars, retained by the attorney for his services in the suit, has been held accountable for and been ordered to distribute three hundred and twenty dollars of this sum of four hundred and seventy dollars, on the ground that the sum of one hundred and fifty dollars was a proper charge by the attorney for his services, and now the assignee makes this motion to compel the attorney to pay over the three hundred and twenty dollars to him. Upon the question whether the assignee should account for this sum a reference was ordered. The assignee appeared upon the reference by the same attorney, and the attorney conducted the hearing and produced testimony, and testified himself.

The register having reported one hundred and fifty dollars was a proper fee, it was held by the court that the assignee was, under the circumstances shown, chargeable with the balance retained by the attorney, three hundred and twenty dollars, as money received by himself. That the claim of the attorney, that he had made an agreement with the assignee by which the amount of his fee was to be contingent on the result of the suit, could not be admitted; that an assignee could not lawfully make such an agreement without express permission of the court. The attorney now, by his answer, raises the same question, and also objects that the court has not power to make a summary order that he pay the money over. As to the issue of fact, I do not perceive any question is raised that has not already been decided. It was decided that the money that came to the hands of the attorney was the money of the bankrupt estate. How much should be allowed out of it for the fees of the attorney who had collected it was a question as to the proper costs of the administration of the bankrupt estate. This court has always exercised the power of determining such questions in a summary way. The power is expressly recognized in General Order, No. 30. If the court has not the

power, and in every case where an assignee employs an attorney the attorney may claim that the amount of his compensation must be determined in a separate suit between him and the assignee, the evident purpose of the Bankrupt Law, that estates of bankrupts shall be summarily administered in this court, would be defeated. This court has power also to determine the validity and amount of liens on the assets of the bankrupt. (R. S. Sec. 4972.)

This is a claim of such a lien. I think the attorney is concluded by the decision as well as the assignee.

The case of *In re* Paschal (10 Wall., 483) is not in point. That case merely holds that where there is a dispute as to amount of fees or charges between an attorney and his client, in respect to a suit prosecuted to a final judgment and recovery in the court, and the attorney has collected the judgment, the court in which the judgment is recovered will not summarily determine the question between the client and attorney, but will leave the client to his remedy by action. If, however, there is no such dispute, it is a power which all courts exercise over their officers to compel an attorney who has collected money which belongs to his client by summary order to pay it over.

In this case the attorney, who is an officer of this court, has come into possession of money belonging to the bankrupt's estate. His claim to it has been determined adversely to him. I see no reason why the assignee should not have an order that he pay it over.

Motion granted.

## UNITED STATES CIRCUIT COURT—OREGON.

JUNE 24, 1879.

**Under Section 1012 of the Oregon Civil Code an attorney cannot acquire a lien for his compensation upon a judgment obtained by him unless he has a special agreement as to the amount thereof.**

In re Scoggin.

A mere debt due by the adverse party to the client of the attorney is not money in the hands of such party within the meaning of subdivision three of said Section 1012, and therefore no lien can be acquired upon it for the compensation of the attorney who may obtain a judgment therefor.

## *In re J. L. SCOGGIN.*

On objections to proof of debt. The facts appear fully in the opinion.

*O. P. Mason*, in propria persona.

*John Catlin*, for the assignee.

Deady, J.—On January 9, 1874, J. L. Scoggin was adjudged a bankrupt in this court, being at the time administrator of the estate of A. H. McQuinn. On April 7, 1877, the county court of Multnomah County, upon the consideration of the final account of said administrator, gave a decree disallowing eight hundred and seventy-six dollars of the same, and made an order directing the distribution of this amount among the children and heirs of McQuinn, eleven in number. Upon the examination of said final account, O. P. Mason appeared as attorney for said heirs, and as such was instrumental in procuring the disallowance aforesaid. Mason had no agreement with said heirs, most of whom were minors, for compensation for his services; but on April 10, 1879, he gave notice to the bankrupt that he claimed a lien upon the decree aforesaid for his compensation as attorney for said heirs "to the extent of twenty-five per cent. upon each heir's share in distribution, together with the full amount of costs and disbursements," which were thirty-three dollars and thirty-five cents. On April 25, 1879, Mason filed a proof of debt with the register for the sum of two hundred and fifty-two dollars and thirty-five cents, that being the amount of his claim for services, and costs, and disbursements. The assignee objected to the proof, and specified as follows: (1) That said claim, except the sum of thirty-three dollars and thirty-five cents costs, is not one against the estate of the bankrupt, nor were the alleged services rendered to or for him; (2) that said claim is not a lien upon the fund in the hands of the assignee; (3) that the alleged lien cannot affect moneys

not in the hands of the administrator; and (4) that said claim, not being one against the bankrupt, cannot be proven against his estate or become a lien thereon.

Seven of the eleven heirs of McQuinn proved their claims, each for the one-eleventh of the amount—seventy-nine dollars and sixty-three cents—while the other four proved their claims for less twenty-five per centum of said amount, which they admitted to be due Mason.

The register admitted the proof of debt for the amount of the costs and twenty-five per centum of four of the several sums claimed by the heirs, and upon the request of the parties certified the question here.

The claimant relies upon Section 1012 of the Civil Code, which provides, among other things, that "an attorney has a lien for his compensation, whether specially agreed upon or implied." . . . "3. Upon money in the hands of the adverse party, in an action, suit or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party; 4. Upon a judgment or decree to the extent of the costs included therein, or *if there be a special agreement, to the extent of the compensation specially agreed on*, from the giving notice thereof to the party against whom the judgment or decree is given, and filing the original with the clerk when such judgment or decree is entered and docketed;"—and insists that he acquired a lien under one or the other of these subdivisions from the time of giving the notice to the bankrupt, and that in equity he is to be deemed an assignee to the amount of such lien, and may therefore prove his claim for the same directly against the estate of the bankrupt. In support of this proposition he cites *Marshall* v. *Meech* (51 N. Y., 140) and *Wright* v. *Wright* (70 N. Y., 98), wherein it was held that an attorney has a lien upon a judgment recovered by him for an *agreed* compensation for the amount of such compensation and costs as against all persons having notice of the same; and that to the amount of such lien he is to be deemed an equitable assignee of the judgment.

This case does not fall within the third subdivision of Sec-

tion 1012. "Money in the hands of the adverse party," within the meaning of this provision, is something more than a mere *debt* from such party to the client of the attorney who claims the lien. On the contrary, "money" in his hands means some specific funds which have actually come into his possession as custodian or trustee, and to obtain which the action or suit is brought. After judgment is obtained upon the claim or demand or for the money, the lien of the attorney can only be acquired upon the judgment under subdivision four of said section.

Whether this sum was ever in the hands of the administrator as money, or whether his liability therefor grew out of a negligent failure to collect the same from the debtors of the estate, does not appear. The decree of the county court, although referred to in the proof of debt, is not found among the papers presented to the court, and, if present, would probably shed no light on the subject.

Nor is the claimant entitled to a lien upon the decree in the county court under subdivision four of said Section 1012, because it does not appear from the notice thereof or otherwise that there was any special agreement as to the amount of compensation to be received for his services. A lien is given upon a judgment for the attorney's compensation only to the extent the latter has been specially agreed upon. He cannot acquire a lien for compensation which is to be measured by a *quantum meruit*. Strictly speaking, the claimant is not entitled to make proof of any claim against the estate except for the costs. Having no lien upon a decree or money for his compensation, he is not a creditor of the estate of the bankrupt. His claim for services is against the heirs of McQuinn, and, if need be, may be enforced against them in an ordinary action, in which the value of the services may be ascertained by the verdict of a jury. But as four of the heirs have practically acknowledged the claim of Mr. Mason by deducting the amount from their proofs of debt, his proof may stand for that amount and the costs as ordered by the register—one hundred and twelve dollars and ninety-eight cents. It is also a question

whether the notice of the alleged lien, having been given after the administrator had been adjudged a bankrupt, should not have been given to his assignee in bankruptcy. Besides, it does not appear when this defalcation took place or this liability occurred. If it was after the administrator was adjudged a bankrupt, then neither the heirs nor the attorney have any claim upon the assets of the estate, which belong wholly to the creditors existing at the time of the adjudication. In such case the administrator is liable to them as if he had never been adjudged a bankrupt.

The ruling of the register is affirmed.

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## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

MAY 2, 1879.

Any District Court in the United States may, in the exercise of its ancillary jurisdiction and in aid of the court in which the proceedings are pending, grant injunctions, stay proceedings, enforce the provisions of composition resolutions, or administer other summary relief as a court in bankruptcy, as to persons or property within the district, if the relief sought is such as the court in which the proceedings are pending would grant if the persons or property to be affected were within reach of the process of that court, provided that court is disabled from giving the same relief by reason of the persons or property not being subject to its process.

After the filing of a petition in bankruptcy no creditor can acquire a lien by attachment, judgment and levy, or otherwise on the property of the debtor which belonged to him at the time of the filing of the petition. The commencement and pendency of composition proceedings makes no difference in this respect, and gives the creditor no right to obtain a lien which he would not otherwise have had.

The bankrupt, on February 11, 1878, filed a voluntary petition, and also a petition in composition in the U. S. District Court for the Eastern District of N. Y. The composition was duly accepted, and was confirmed and ordered to be recorded on May 21, 1878. The bankrupt was adjudicated April 18, 1878, but no assignee was appointed. After the petition was filed, a creditor residing in the Eastern District of N. Y., whose name and address and the amount of whose debt appeared on the schedule, commenced an action against the bankrupt, and caused an attachment to be issued to the Sheriff of the City and County of New York, who thereupon attached certain goods in the store of the bankrupt. Judgment was rendered in said action in favor of the creditor on the 18th of April, 1878, and an execution was on the same day issued to said sheriff, who levied on the goods attached. On an application for an injunction to stay the sale, *Held*, That the creditor acquired no lien on the property by his attachment, judgment, and levy; that the case was clearly one in which

**the Court of the Eastern District would stay proceedings if the officer were within that district; that while this court could not restrain the creditor because it was a resident and within reach of the process of the Court of the Eastern District, yet an injunction staying the proceedings of the sheriff until the question of the bankrupt's discharge shall be determined was within the power of the court and should be granted.**

## *In re ALANSON H. TIFFT.*

THE facts appear fully in the opinion.

*H. E. Davies* and *C. H. Phelps*, for creditor.
*A. C. Aubery* and *L. Henry*, for bankrupt.

CHOATE, J.—This is a petition of Alanson H. Tifft, who has filed a voluntary petition in bankruptcy in the Eastern District of New York, asking an injunction against the Sheriff of the County of New York to restrain the sale on execution of certain property of the bankrupt on which the sheriff has made a levy, and for other relief.

The petition in bankruptcy was filed February 11, 1878; on the same day the debtor filed a petition in composition, and thereupon a meeting of creditors was called, in pursuance of the statute, to consider the same. The composition proposed was 33⅓ per cent., for which notes were to be given, payable in six, nine, twelve, fifteen, and eighteen months. The proposed composition was duly accepted by the creditors and was confirmed by the court, and ordered to be recorded May 21, 1878. Among the creditors whose names and addresses and the amount of whose debt were mentioned in the schedule produced at said meeting was the Iron Clad Manufacturing Company, a corporation organized under the laws of New York, and having its principal office or place of business in the city of Brooklyn, in the Eastern District of New York.

The petitioner was adjudicated a bankrupt April 18, 1878. No assignee has been appointed. On the 10th of April, 1878, the Iron Clad Manufacturing Company commenced an action in the Marine Court of the City of New York against the bankrupt, procured a warrant of attachment therein, and under the warrant the sheriff of the county of New York attached certain

goods of the bankrupt in the store at which he transacted his business. On the 18th of April the corporation recovered judgment in said action for eight hundred and seventeen dollars and ninety-three cents. An execution was on the same day issued thereon and the sheriff made a levy on the same goods. No sale has yet been made under the execution. The relief asked in the petition is that the corporation and the sheriff be enjoined from enforcing the execution or judgment, or from removing, disposing of, or in any manner interfering with the property so levied on, or any other property belonging to the said petitioner, until the question of his composition or discharge shall be lawfully determined, and until the further order of this court, and for such other or further order or relief as the court shall deem equitable or proper. It appears by affidavit put in by respondent that the corporation violated no injunction of the Bankrupt Court in entering its judgment and issuing execution and making its levy thereunder, and that the levy was made before the order of adjudication was entered on the 18th day of April.

I think it must be regarded now as settled by authority that the District Courts of the United States can exercise the jurisdiction conferred upon them by the law not only in the district where the original petition is filed, but in any district, when the exercise of such jurisdiction is essential to the complete and full execution of the Bankrupt Law, and when the power of the court in which the original petition is filed fails because the persons or property against whom the relief to which a party is entitled is sought are beyond the limits of the district, and so cannot be reached by its process.

While the particular applications of this principle have generally been on proceedings to collect or receive assets, yet the reasoning of the court is not limited to that single matter, but extends to all other proper relief. The theory of the decisions is that Congress intended to provide ample machinery for the administration of the law throughout the United States. (*Shearman* v. *Bingham*, 7 N. B. R., 490; *Lathrop* v. *Drake*, 13 N. B. R., 472, 1 Otto, 516; see also *McGehee* v. *Hents*, 17

N. B. R., 136.) When, therefore, by an amendment of the Bankrupt Law, the provisions relative to composition were adopted, the same power and jurisdiction of the District Courts throughout the United States attached to these new proceedings; for they are in every sense proceedings in bankruptcy as truly as the proceedings theretofore allowed and prescribed by the Bankrupt Law. This court may, therefore, in the exercise of this ancillary jurisdiction, and in aid of the District Court of the Eastern District, as to persons and property within this district, grant injunctions, stay proceedings, enforce the provisions of composition resolutions, or administer other summary relief as a court of bankruptcy in a case pending in the Eastern District, if the relief sought is such as that court would grant if the persons or property to be affected were within the reach of the process of that court; provided, of course, that court is disabled from giving the same relief by reason of the persons or property not being subject to its process.

The questions therefore to be determined are whether the bankrupt would be entitled to the relief sought if the persons and property against which it is sought were in the Eastern District, and whether the District Court in the Eastern District is unable to reach the same effectually by its own process.

As regards all relief sought against the creditor, the Iron Clad Manufacturing Company, the prayer of the petitioner must be denied, because upon the petition it appears that this corporation has its principal place of business in the Eastern District, and in the absence of any averment or proof to the contrary it must be presumed that the proper officers through whom the coercive power of the court must be exercised are within reach of its process.

It is, I think, beyond dispute that, on the admitted facts in this case, the Iron Clad Manufacturing Company is bound by the composition, and that it did not, and could not, by the alleged attachment and levy on the bankrupt's property, obtain any lien thereon.

The statute declares that "the provisions of a composition

accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amount of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors." The same section provides "that in all cases in bankruptcy now pending by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting, etc., resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor;" and further, that the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way, and creditors whose debts are fully secured shall not be entitled to vote upon or to sign such resolution without first relinquishing such security for the benefit of the estate.

It seems to me too plain for argument that the creditors referred to as those who may meet and accept the composition are the same class of persons who in the Bankrupt Law are designated as the creditors who have the right to prove their debts and share in the estate of the bankrupt if administered through an assignee under the direction of the Bankrupt Court—namely, those who are creditors at the time of the filing of the petition in bankruptcy—and that the secured creditors here referred to are creditors who at that point of time held security by mortgage, pledge, or other valid lien on the estate, real or personal, of the bankrupt; and that no creditor not then having such security can, either by the voluntary act of the bankrupt or through attachment or levy, acquire any lien on the estate of the bankrupt so as to be, within the meaning of this section, a secured creditor for the purposes of the composition. It is insisted, on behalf of this creditor, that even after a voluntary petition in bankruptcy is filed, the title to the property still is in the bankrupt; that neither the filing of the petition nor the pendency, if no assignee is appointed, of the composition pro-

ceedings takes away the right of the creditor to sue the bankrupt and attach his property; that, unless restrained by injunction, a creditor so suing and attaching and levying becomes a secured creditor if his attachment or levy is made before the composition resolutions have any validity, which by the act is not till they are confirmed and recorded, and therefore, being a secured creditor, he need not and is not at liberty to take part in the meeting nor bound thereby; that the composition does not, like an assignment, relate back to the time of the filing of the original petition in bankruptcy, but by the express provisions of the composition section has no validity till accepted and confirmed by the court. It is further argued that this debtor, although he filed his petition as a bankrupt, did not procure an order of adjudication thereon till April 18th, after this levy was made, and therefore was not entitled to an injunction against his creditors to stay their suits, as it has been determined in this case, and hence it is argued that the creditor had a perfect legal right, by his diligence in suing, to get this security by attachment and levy on the bankrupt's property.

It is true that it has been held that the filing of a voluntary petition in bankruptcy does not divest the bankrupt of the title to his property. (*Hampton* v. *Rouse*, 11 N. B. R., 472.) It has been also held in this case that while a voluntary bankrupt declines to be adjudicated he is not in a position to ask the protection of the court against suits by his creditors. (*In re* Tifft, 18 N. B. R., 78.) But there is nothing in these cases, or in any other cited by the learned counsel, which holds or gives any support to the position here taken that, after the filing of a voluntary petition, a creditor who was such at the time of the filing of the petition can acquire any lien or security whatever by attachment, judgment and levy, or otherwise, in the property of the debtor, which belonged to him at the time of the filing of the petition. If there is one thing certain in the construction of the bankrupt law, it is that no such lien can be acquired.

The law carefully preserves all existing liens—that is, existing at the time of the commencement of the bankruptcy pro-

ceedings—excepting only attachments made within four months before that time. This very exception shows conclusively that it was not intended that any creditor should acquire any lien by an attachment after that time. And if it be said that it is not so expressly provided in the Bankrupt Law, the answer is that it is so unmistakably to be implied from its terms that an express prohibition was wholly unnecessary.

The obvious purpose of the law was to liquidate the debts of the bankrupt as of that point of time, and distribute all his property as it then was, subject to existing liens other than attachments of less than four months, equally among all his unsecured creditors according to the amounts then due to them respectively.

While the title to the property is not divested until appointment of an assignee and a formal assignment to him, the bankrupt becomes at once disqualified to deal with his estate. It passes in his hands, unless taken from him by the court by warrant or through a receiver, under the immediate protection of the Bankrupt Court, and the interests of creditors as *cestuis que trust* at once attach to it, and his control over it is restricted to acts done as trustee for the creditors, and those of a very limited character and extent. (*In re* Vogel, 2 N. B. R., 427.) While the personal exemption of the bankrupt from suits may depend upon his being an adjudicated bankrupt, the exemption of his property from any newly accruing rights of creditors by way of security, and the power and duty of the court to distribute it among the creditors, are the very fundamental principles of the act. The distinction is very plain between the personal exemption of the debtor from suits and the exemption of the estate from further liens.

The cases of *Wilson* v. *City Bank* (9 N. B. R., 97, 17 Wall., 473), and *Clark* v. *Iselin* (11 N. B. R., 337, 21 Wall., 360), cited for the creditor, have no bearing on the question at all. Those decisions relate exclusively to liens existing before the commencement of bankruptcy proceedings. The same is true of *In re* Clapp (14 N. B. R., 191) and *In re* Shield (15 N. B. R., 532); they have no bearing on this case whatever.

The case of *Johnson* v. *Bishop* (8 N. B. R., 533, 1 Wool., 324) also has no bearing on this question. In that case the defendant, a sheriff, had attached property of a debtor. The debtor afterwards filed his petition in bankruptcy. The assignee in bankruptcy being appointed, brought an action of detinue in the District Court of the United States for the goods attached. That court dismissed the suit for want of jurisdiction, and the case came up before the Circuit Court on review. The question discussed was whether such an action would be based on or necessarily require the taking of the property from the possession of the sheriff by the marshal, and it was held that the action would not lie. It will be seen that the question did not nor could arise, whether a valid attachment could be made after the filing of a voluntary petition in bankruptcy.

The commencement and pending of composition proceeding makes no difference in this respect, and gives the creditor no right to obtain a lien which he would not have otherwise had. The statute allows these proceedings for composition, whether there has been an adjudication or not. It is said that this power to bind a dissenting minority being in derogation of common right, the statute giving the power should be strictly construed, and no doubt this suggestion, properly applied, has some force; but the composition statute is engrafted upon the Bankrupt Law as an amendment, and must have a fair and reasonable construction as constituting a part of a single system of law. It cannot surely be held that the mere fact that composition proceedings are instituted which are expressly stated in the act to be of no validity till they are completed by acceptance or compromise, throws open the property of the bankrupt meanwhile to a race of diligence as between the very creditors who, if the composition is accepted, will be bound thereby. This would be a construction which would subvert the very purpose for which the composition is allowed, and defeat its intended equal distribution of a stipulated percentage among the creditors named in the schedule. The composition proceedings, therefore, instead of furnishing

a reason which did not exist before for allowing an attachment after the filing of the petition, furnishes a new ground for holding that no such attachment was intended to be allowed. It has been recently held by Judge Woods that, even after the confirmation of a composition and the debtor's failure to comply with its terms, the court has power under Revised Statutes, Section 2806, to stay suits of creditors. (*In re* Bagley, 19 N. B. R., 73.) The reasoning of that case is conclusive that the pendency of composition proceedings does not enlarge the rights of creditors to acquire liens on the debtor's property after the filing of a voluntary petition.

The right that a creditor not bound by the composition may have after the confirmation of the composition, from the benefits of which he is excluded, either in the way of carrying on his suit or reaching property which the resolutions of composition have remanded to the uncontrolled custody and disposal of the bankrupt, is not now in question. The position of such a creditor may be such that by the common action of his debtor and the other creditors new rights in this respect arise; but we have now to do with a creditor who is bound by the composition.

As to him there can be no doubt that the proceeding in bankruptcy is still pending, so long as the composition is not paid or upon the failure of the composition, till the question of the bankrupt's discharge has been determined. (*In re* Bagley, *ubi supra.*)

It is entirely clear, therefore, that the Iron Clad Manufacturing Company could not acquire any lien by its attachment and levy, and that as against it the court is bound to enforce the compromise by all orders it can lawfully make for that purpose; that under the power of the court to stay proceedings in suits brought by creditors pending the determination of the question of the bankrupt's discharge, now that the bankrupt has been adjudicated, the court can stay the corporation and the sheriff from proceeding further under the execution.

It appears by the petition, and is not denied, that the sheriff has withdrawn his keeper; there is no need, therefore, of

any proceeding to take the goods from the sheriff, nor to decide the question whether, so far as the sheriff is concerned, this could be done otherwise than by a proper action in the State Court, or by some proceeding in the suit on which the execution issued, nor would it be proper for the court to express any opinion as to the relief which the bankrupt may have against this creditor in the Eastern District of New York, if any, by way of compelling them to release this pretended security, in order to enable the bankrupt to carry out his composition. An injunction staying the sheriff from any further proceeding under his execution, which is plainly within the power given to the court under Rev. Stat., Sec. 5196, will effectually prevent the recapture of the goods. They are now in the possession of the bankrupt, subject to no lien, and by favor of this creditor. The only remaining question is whether this relief could be granted by the District Court of the Eastern District.

In the case of *In re* Hirsch (2 N. B. R., 3) it was held to be a matter of serious doubt whether an injunction, even as against a creditor who is a party to the proceeding, could be effectually issued and served out of the district. In the case of *In re* Richardson (2 N. B. R., 202), while this doubt was recognized, it was held that a District Court in a district other than that in which the original petition was filed had no ancillary jurisdiction to issue an injunction staying the proceedings of creditors within its jurisdiction and beyond the jurisdiction of the Court in which the original petition was filed; and it was suggested that as against suits thus carried on out of the reach of the District Court in which the original petition was filed, the bankrupt and the other creditors who may suffer thereby are practically remediless.

The case of *Markson* v. *Heaney* (4 N. B. R., 510) approved the views expressed in *In re* Richardson, and recognizes the same possible failure of justice unless there should be an amendment of the Bankrupt Law, from the inability to extend the process of the court beyond the limits of the district. This whole subject, however, was carefully reviewed in *Shearman*

*Bingham* (*ubi supra*), and while the opinion was expressed that process of each court is limited to the territory of its particular district, it was distinctly held that all other District Courts throughout the United States have ancillary jurisdiction in the same cases sitting in bankruptcy within their respective districts.

Thus, it is said (p. 492): "Judges of the District Court must sit, undoubtedly, in the respective districts for which they are respectively appointed, and no doubt is entertained that the process of the court in proceedings in bankruptcy cases is restricted to the territorial limits of the district; but the language of the first section of the Bankrupt Act, describing the jurisdiction of the District Courts sitting as Courts of Bankruptcy, is that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy; showing unquestionably that they can only sit and exercise jurisdiction in their own districts; but the limitation that the proceedings in bankruptcy must in all cases be pending in that district is not found in that clause of the first section of the act;" and apparently referring to the cases cited above, of *In re* Richardson and *Markson* v. *Heany* (p. 501), the court further says:

"Contrary decisions have been made by several of the district judges, and in one case by a circuit judge; but it must suffice to remark in respect to those decisions that the reasons assigned in support of the conclusions do not appear to be satisfactory. They assume what is not correct—that the jurisdiction of the District Court is confined to the district in which the proceedings shall be pending. Such an expression is contained in the first clause of the second section of the act which describes the revisory power of the Circuit Courts, but it is not contained at all in the first section of the act, and courts of justice have no right to enact such an amendment."

This case and its approval by the Supreme Court of the United States must be taken, therefore, to have set at rest the doubts that before existed on these points, and it is sufficient authority for the position: first, that the Court of the East-

ern District cannot effectually enjoin the Sheriff of the County of New York, because the process by that court does not run out of the district; and secondly, that any other District Court of the United States may, in a case pending in the Eastern District, exercise ancillary jurisdiction in the same case over persons within reach of its own process, provided the relief sought properly falls within the first section of the Bankrupt Act. That jurisdiction extends among other matters to "the adjustment and various priorities and conflicting interests of all parties to the marshalling and disposition of all the different funds and assets so as to secure the rights of all parties, and the due distribution of the assets among all the creditors, and to *all acts, matters, and things to be done under* and in virtue of the bankruptcy."

The power to stay suits by creditors given by the 21st Section of the Bankrupt Act (R. S., 5606), and the power to enforce composition are not expressly confined to the District Court of the district where the petition is pending. They are therefore powers which any District Court in the due exercise of this ancillary jurisdiction may properly exercise.

In this case, therefore, I have no doubt of the power and duty of this court to enjoin the sheriff from any further proceedings under the execution.

The case is clearly one in which the court of the Eastern District would stay proceedings if the officer were within the district. The suit on the part of the creditor is a most clearly unlawful attempt in direct defiance of the rights of the other creditors, and of the bankrupt, and in violation of the agreement by which he is bound to make good, by legal proceedings, a pretended lien which has no existence in fact or in law.

Injunction granted against the sheriff, staying all further proceedings till the question of the discharge of the bankrupt shall have been determined, without prejudice to any other proceedings in this or any other court for other relief.

UNITED STATES CIRCUIT COURT—E. D. WISCONSIN.

JUNE, 1879.

**The individual bankruptcy of a person who is a stockholder in, and a director and officer of a corporation which is *not* in bankruptcy does not incapacitate him from exercising his functions as such officer of the corporation to such extent as to render inoperative and void as to third parties the acts and conveyances of the corporation when done and executed through him as its representative.**

## *THE ATLAS NATIONAL BANK* v. *THE F. B. GARDNER COMPANY, LEWIS N. BAKER et al.*

This was a creditor's bill. From the bill, answers and testimony, the leading facts in the case appeared to be these: In 1876, and for a considerable time prior thereto, the F. B. Gardner company was a corporation organized under a law of this State, which authorized the organization of corporations for manufacturing purposes. It owned a large quantity of real estate and personal property, and was engaged in the manufacture of lumber, its place of business being at Pensaukee in this State. In 1875 the corporation executed a mortgage to one White upon a large part of its lands and real property to secure certain indebtedness, which mortgage was afterwards transferred to and held by complainant, and was during the year 1876 foreclosed in this court; the bill to foreclose being filed March 11, 1876. After sale of the mortgaged property, and at the October term, 1876, a judgment for a deficiency amounting to twenty-one thousand one hundred and six dollars and eighteen cents was rendered in favor of the complainant against the defendant company, upon which execution was issued and returned *nulla bona.*

On the first day of March, 1876, the company made certain transfers by deed of conveyance, lease and bill of sale to the defendant Baker, of a large quantity of real estate and personal property, the real estate consisting of timbered lands, village

lots, mills, shops, residence and hotel property, and the personalty consisting of pine logs, lumber, shingles, wood machinery, goods, fixtures and other chattel property of various descriptions, taking from Baker in payment therefor his seven promissory notes, one for five thousand dollars, due in three months, five for six thousand dollars each, due respectively in four, six, eight, twelve and eighteen months, and one for seven thousand five hundred dollars, due in twenty-four months from date.

On the 10th day of March, 1876, the stock of the defendant company consisted of five thousand shares of one hundred dollars each; of which the defendant, F. B. Gardner, held four thousand nine hundred and eighty-nine shares, one John Spry held ten shares, and one J. C. Gardner held one share. These three parties constituted the Board of Directors; F. B. Gardner being the president and J. C. Gardner being the secretary of the company, and until the 4th day of September, 1876, the books of the corporation showed the ownership of stock as above stated.

On said 10th day of March, 1876, a petition for the adjudication of F. B. Gardner as a bankrupt was filed in the District Court of the United States for the Northern District of Illinois, and on the 28th day of March he was adjudicated bankrupt. On the 29th day of April, 1876, an assignee in bankruptcy was appointed. On the 2d and 31st days of August, and the 2d day of September, 1876, the defendant company, F. B. Gardner acting as president and J. C. Gardner acting as secretary, made conveyances of numerous tracts and parcels of land, then owned by the company, and not covered by complainant's mortgage, to E. O. Grosvenor, H. E. Durand, Herman Ruther, Elijah M. Haines, Geo. Schecht, Geo. L. Tracy, Martin Ryerson, E. Meyer, the heirs of Robert McNullen and one Mrs. Ross (all of whom are defendants in the present bill), to secure the payment of indebtedness then owing by the company to said parties respectively, the conveyance to Durand being in trust for the benefit of other parties who were then creditors of the corporation, and who are also defendants in

this bill; all of which conveyances purported to be and were executed as the deeds of the corporation.

On the same 31st day of August there was a settlement made between the defendant company and the defendant Baker, touching the then existing indebtedness from the latter to the former, at which settlement there were surrendered to Baker and cancelled the two notes for six thousand dollars each due in one year and eighteen months respectively, and the note for seven thousand five hundred dollars due in twenty-four months, which surrender of notes was accompanied by a re-conveyance by Baker to the company of a portion of the lands which originally he had purchased from the company.

On the 4th day of September, 1876, there was a sale at public auction by the assignee in bankruptcy of F. B. Gardner, of the four thousand nine hundred and eighty-nine shares of stock he held in the defendant corporation, such sale having been originally advertised to take place on the 3d day of August, and having been postponed until the 4th day of September.

It was claimed by complainant that the conveyances and lease of real estate and transfer of personal property to Baker on the 1st of March, 1876, were not made in good faith, were without any consideration in fact, and were fraudulent as to the creditors of the company; that the adjudication of F. B. Gardner as a bankrupt by the District Court in Illinois, the appointment of an assignee and the assignment to him of the bankrupt's estate on the 29th day of April, 1876, operated to extinguish his ownership of the stock in the defendant company, and to transfer such ownership to the assignee, and, therefore, to disable Gardner thereafter to act as a director and officer of the corporation, and as a consequence take from him the power to make for the company the conveyances of property before mentioned; that the parties receiving the conveyances had knowledge at the time that Gardner had been adjudicated a bankrupt; that such conveyances were made when the defendant company was insolvent, and when it was expected that there would be a deficiency arising on the sale

of the premises covered by complainant's mortgage which was then in process of foreclosure, and that these conveyances were fraudulent and void. It was claimed further, that the transaction with Baker on the 31st of August, 1876, when three of his notes to the company were surrendered, was also fraudulent; that Baker then knew that Gardner was in bankruptcy, and that the surrender of the notes was without consideration; also that the postponement by the assignee in bankruptcy of Gardner of the sale of his stock in the defendant company from the 3d day of August to the 4th day of September, was procured by Gardner and was part of the alleged fraudulent scheme for transferring the property of the company, so that complainant could not reach it to satisfy an anticipated deficiency on its mortgage.

The answer of the defendant Baker alleged that the sale, lease, and transfer to him on the 1st day of March, 1876, were made for an actual and adequate consideration, viz.: forty-two thousand five hundred dollars agreed to be paid by him to the company, and evidenced by his promissory notes; that the entire transaction was in good faith and without fraud on the part both of himself and the company.

As to the transaction between the parties on the 31st of August, 1876, it was claimed that the consideration for the surrender to Baker of his two notes—one for six thousand dollars due in eighteen months from March 1st, 1876, and one for seven thousand five hundred dollars due in twenty-four months—was a re-conveyance to the company by him of certain lands which constituted an adequate consideration for the notes. That the surrender of the other six thousand dollar note due in twelve months was made because of loss and damage which it was agreed had been sustained by Baker in consequence of the failure, in both quantity and quality, of the logs included in the purchase of March 1st, to fulfil the representations and understanding as to quantity and quality, made and had at the time of the purchase; and it was alleged that these transactions were entered into in good faith, without any fraudulent design or intent on the part of either of the parties, and with-

out any expectation that the premises mortgaged to complainant would sell for less than enough to pay the mortgage debt.

Other of the defendants answered the bill, alleging that the conveyances of real estate to them by the defendant company were made to secure the payment of just and *bona fide* indebtedness then owing to them, and that the same were made in good faith, and denying all charges of fraud or fraudulent intent in their several transactions with the defendant corporation.

*W. S. Burgess*, for complainant.
*Luther S. Dixon*, for defendants.

After disposing of other questions in the case, the opinion of the court proceeded as follows:

DYER, J.—There remains for consideration another question, and which was the principal one discussed at the bar, namely, the effect of the bankruptcy of F. B. Gardner upon his power to act in the transactions sought to be annulled, as a director and as the president of the defendant company. The position is taken by complainant's counsel that the effect of the bankruptcy proceedings instituted against Gardner in Illinois in March, 1876, was to transfer his ownership of stock in the company to the assignee in bankruptcy, and that thereafter he was disqualified from acting as an officer of the company, and consequently that he had not the power to make for and in behalf of the company the conveyances to the defendants which the bill seeks to set aside, nor to make the settlement with Baker on the 31st of August, 1876.

The testimony does not show when the stock held by Gardner came into the actual possession and control of his assignee in bankruptcy, but it tends to show that after the bankruptcy of Gardner the business of the corporation, so far as it had business to do, proceeded as it had done before. The stock was advertised to be sold by the assignee, as part of the assets of Gardner, on the 3d day of August, 1876; but the sale was postponed to the 4th day of September. It is charged that

this postponement was procured by Gardner, and as part of a scheme to enable him to consummate the transactions complained of, before there should be a sale. The testimony, I think, fails to sustain this charge. The only testimony on the subject is that of Gardner himself, who says that some of his creditors suggested a postponement in order to ascertain something further about the value of the stock; that he had some idea of bidding on the stock, and that he made some suggestions to others to bid; that he thought the stock would bring more if other parties were prepared to bid, but they did not then interest themselves in it, and the sale was adjourned thirty days. He says further, that he might have had some influence in having the sale postponed, but the circumstances as they are disclosed by the testimony fail to establish a fraudulent purpose in procuring the postponement.

It seems not very material why the sale was adjourned, if the position is sound that by virtue of the bankruptcy proceedings, and by operation of law, Gardner was divested of the right and power to act as an officer of the defendant company, after the assignment in bankruptcy.

Now the question fairly stated is, does the individual bankruptcy of a person who is a stockholder in and director and officer of a corporation which is *not* in bankruptcy, to such extent incapacitate him from exercising his functions as such officer of the corporation as to render inoperative and void as to third parties the acts and conveyances of the corporation when done and executed through him as its representative.

A further feature of the case, in connection with the question, is, that Baker at the time of his settlement, and most of the other defendants at the time they took their conveyances and mortgages, had knowledge or information in a general way that Gardner was in bankruptcy; some of the parties being creditors of both the corporation and Gardner. By the statute under which the corporation was organized, it is provided that the stock, property, affairs and business of the corporation shall be under the care of at least three directors to be chosen annually by the stockholders, *and who shall be stock-*

*holders*, and shall hold their offices for one year, *and until others shall be chosen in their stead.* Further, that the directors shall choose one of their number president and such other officers as may be required, who shall hold their offices one year, or until a majority of the stockholders choose others in their stead. Power is given the corporation to acquire, mortgage and dispose of real and personal property, and the stock is declared to be personal property, transferable only on the books of the corporation. And it is to be observed, that there is no statutory declaration of a vacancy in the office if an officer ceases to be a stockholder.

The question that is presented for solution may perhaps, in view of the manner in which it arises, be said to be one of first impression. In the absence of fraud, I can hardly think that its determination is to be affected by the fact that the third parties dealing with the corporation knew that Gardner was in bankruptcy. Complainant's case must stand or fall upon the proposition that Gardner had not power to act as a director or representative of the corporation, because the ownership of his stock had passed to his assignee in bankruptcy, and therefore that his acts were void. If the affirmative of this proposition be sound it would seem that the individual bankruptcy of Gardner absolutely vacated his office of director and president of the corporation, so that he could not thereafter be such officer either *de jure* or *de facto.*

I cannot bring my mind to such a conclusion. For even if the legal title to the stock passed to the assignee in bankruptcy by virtue of the bankruptcy proceeding, still up to that time Gardner had been an officer of the corporation duly chosen. His term of office had not yet expired. The statute under which the corporation was created provided that he should hold his office till another should be chosen in his stead, and it would seem that, so far as third parties were concerned, if he did not continue to be an officer *de jure*, he was thereafter an officer *de facto*, whose acts would be binding on the corporation, and would be the acts of the corporation. It is true the statute of incorporation provides that the officers shall be stock-

holders, but that provision is directory, and, as before observed, there is no statutory declaration that a vacancy shall be deemed to exist if the officer, before his term expires, shall cease to be a stockholder. It has been held that one who is elected an officer in a corporation by the body in which the power to elect is vested, but by a less number of that body than the charter authorizes, is an officer *de facto*, and that his acts, as respecting third persons, are valid.

In the case of the *United States* v. *Dandridge* (12 Wheat., 64), where it appeared "that the directors of the parent bank, empowered to establish offices of discount and deposit, subject to such rules and regulations as they should deem proper, passed a by-law, directing 'that the cashier of each office shall give a bond . . . . with two or more approved securities with condition for his good behavior and faithful performance of his duties to the corporation,' and a fundamental article of the constitution of the bank directed 'that each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond,' etc., it was held that a cashier appointed and permitted to act in his office, without giving such bond, or any bond whatever, was a legal agent of the corporation; that his acts and contracts within the scope of his authority were valid, whether in favor of the bank or against it in favor of third persons, and that the charter and by-law were directory in this particular, and the taking of the bond not made by them a condition precedent . . . It was admitted, however, that if the statute had prescribed that the cashier *should not be deemed for any purpose in his office* until an approval of his official bond by the proper board, his acts would have been utterly void unless his bond had been given and approved." (Angell & Ames on Corporations, Section 285.) Just so, it may be added, would be the fact in the case at bar, if the statute declared that upon ceasing to be a stockholder, the office of director should be deemed vacant. Before his bankruptcy, Gardner was an officer *de jure;* afterwards he continued to act under *color of* right, and so was an officer *de facto*. If a corporation elect a person a director who is ineligible to that office

and permit him to act as such, the corporation will be bound by the acts which he performs within the scope of the authority possessed by a director. (12 N. H., 205.) And as his acts cannot be questioned by the corporation, they cannot be by those who claim under the corporation or collaterally.

And it is to be borne in mind that the power of Gardner to act as an officer of the corporation is questioned not by direct proceeding to vacate his office, but by a party who stood originally in the position of secured creditor, in a proceeding against other creditors, whose demands, presumably *bona fide* and valid, have been secured through the acts and instrumentalities the validity of which is thus questioned. And so far at least as such creditors are concerned, their equities seem to be equal to those of complainant, provided their transactions with the corporation are untainted by fraud.

On the whole, the only satisfactory conclusion I can arrive at is, that, notwithstanding his bankruptcy, Gardner was director and president *de facto* of the corporation, and as such, in the absence of fraud, the acts performed by him were the acts of the corporation, and that the transactions of the corporation, consisting of the settlements, conveyances, and mortgages in question, were valid and should not be disturbed.

Bill dismissed.

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SUPREME COURT—ILLINOIS.

JANUARY 25, 1879.

**Not every debt where there is confidence reposed is a fiduciary debt within the meaning of the Bankrupt Law. A debt contracted under a contract providing for a limited partnership is not a fiduciary debt.**

## *DANIEL PIERCE* v. *EMERSON C. SHIPPEE.*

CRAIG, J.—This record contains no evidence which would warrant the jury in finding that the debt was created by fraud. So far as is shown by the proofs, the money was obtained in good faith, and invested as was contemplated by the parties;

the speculation, however, did not prove to be a fortunate one, and hence the loss and consequent liability of the defendants; but the transaction by which the defendants became indebted to the plaintiff is divested of any element of fraud, so far as we can perceive from an examination of the evidence; it will not be necessary, therefore to spend any time over this branch of the case.

The next question that arises is whether the debt was created by Shippee while acting in a fiduciary capacity. If it was, his discharge in bankruptcy would not relieve him from the liability incurred. The money which the plaintiff furnished the defendant was furnished under a contract which must determine the character and nature of the debt. That contract was, in substance, that plaintiff would furnish the money necessary to buy a certain quantity of corn; defendants were to furnish the cribs, do all the work, and bear all the expenses; and when the corn should be sold, each party was to have one-half of the amount the corn brought, after first deducting the amount paid for the corn when purchased; if the corn should not sell for as much as was paid for the same, then defendants were to pay the plaintiff one-half of the loss. As appears, the corn was bought, cribbed, and, in the following spring, shipped and sold at a heavy loss.

We perceive no element in the transaction which would make it a fiduciary debt. The money was invested in corn, as agreed upon; the corn was cribbed, as contemplated, held as understood. The fact that the corn was not bought in the name of the plaintiff, or shipped in his name, if such be the fact, does not change the character of the transaction.

There was a limited partnership created, where the parties to the contract were to share in the profits and losses of the enterprise. The defendants were not trustees of the plaintiff, nor does the transaction disclose any relation of trustee and *cestui que trust.*

The case of *Melleson* v. *Kellogg* (15 Ill., 547), cited and relied upon by the plaintiff, is so different in its facts that it cannot be regarded as an authority in this case. There, money

was received under a written agreement by which Wright bound himself to buy a quarter of land in Warren County for certain parties; he failed to use the money for the purpose for which it was furnished him, and it was then held his discharge in bankruptcy did not release him from the debt. It was there said, "where one receives the money or property of another as agent or bailee, the title to which is to remain in the principal, and which is to be paid over or delivered to him, or to be used in a particular way or for a specified purpose for his use, then the money or property is received or held in a fiduciary capacity, or as trustee.

In *Chapman* v. *Forsyth* (2 How., 202) it was held that a factor who receives the money of his principal is not a fiduciary within the meaning of the Bankrupt Act. In that case it was said, "if the act embraced such a debt it would be difficult to limit its application. It must include all debts arising from agencies, and, indeed, all cases where the law implies an obligation from the trust reposed in the debtor; such a construction would have left but few debts on which the law could operate." There is no material difference between the language of the act of 1841 and the present act, so far as this question is concerned; and, under the decision last cited, it would be impossible to make the defendants fiduciary debtors.

So far as the evidence shows, the only default of the defendants arises from the fact that they failed to pay over to the plaintiff one-half of the money he advanced, with which the parties engaged in the speculation. This default is not a breach of trust; it is a mere breach of contract; and, should this undertaking be held to be a fiduciary obligation within the meaning of the act, upon the same principle almost every legal or equitable obligation of a debtor would have to be included within the same list.

We are satisfied the verdict is in accordance with the preponderance of the evidence, and we perceive no ground for disturbing it.

The judgment will be affirmed.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

MAY 9, 1879.

The bankrupts owned a license or permit to occupy certain stalls in Washington Market in the city of New York. This license was revocable at the will of the city, and its assignment gave the assignee no rights unless consented to by certain municipal officers. It appeared that the bankrupts paid the sum of four thousand dollars for said license, and that it could be sold for nearly as much, and that the creditors had been induced to give the bankrupts credit partly on the ownership of these rights. The city having refused to recognize the rights of the assignee under his general assignment, the latter moved for an order to compel the bankrupts to transfer their license to him. *Held*, That the motion should be granted; that the license was properly within the purview of the Bankrupt Law and passed to the assignee.

*In re* Sutherland, 6 Biss., 526, distinguished.

## *In re GALLAGHER & LANE.*

THE facts appear fully in the opinion.

*G. A. Black*, for assignee.

*G. A. Seixas*, for bankrupts.

CHOATE, J.—This is a motion to compel the bankrupts to transfer to the assignee their license or permit to occupy certain stalls in Washington Market. The objection is taken that it is not property which passes to the assignee under the Bankrupt Law. It appears that the right to use and occupy a certain portion of the market is granted by the city for a certain fixed rent without limit of time; that it is revocable at the will of the city; that its assignment gives the assignee no rights unless consented to by certain officers of the city. It appears, however, that such rights have a well-established pecuniary value, and by an established usage of the city in dealing with them there is no practical difficulty in the transfer of them from one party to another; that in a statement of their assets made to induce credit in their business, these bankrupts, within a year before their bankruptcy, put down these Washington Market stands as worth four thousand dollars; that they cost

about that sum, and can be sold for nearly as much; that these creditors of the bankrupts were in fact induced to give them credit partly on the ownership of these rights. The assignee having applied under his general assignment in bankruptcy to the city, has been refused any recognition as assignee of the license, now shows by affidavit that if he shall have an assignment directly from the bankrupts his rights as assignee will probably be recognized. I think the objection as applied to this case cannot avail. It is obvious enough that this license or right, or whatever it may be called, has a fixed pecuniary value. It was a part of the bankrupts' capital in business, in which they had invested their money, and on the faith and credit of which they incurred their debts. It is grossly unjust and inequitable under these circumstances that they should be permitted on merely technical grounds to withhold it from their creditors. If in one sense, and for some purposes, it cannot be regarded as "property," as, for instance, not for the purpose of being held by a receiver (*Barry* v. *Kennedy*, 11 Abb., N. S., 421), yet it seems to me that it is clearly property within the purview of the Bankrupt Law.

There is a distinction between this purely business right and the right of membership in a business exchange or company. Thus it has been held that the right of membership in a board of trade did not pass to the assignee, though having a pecuniary value. (*In re* Sutherland, 6 Biss., 526.) But that case was not a case of a right of a purely business character. The element of personal choice of associates constituted a part of the basis of the membership. That element is wanting here. It is not to be presumed that any such consideration would or could affect the action of the city in giving or withholding its assent to an assignment. In an unreported case in this district, Judge Blatchford refused to make an order for the sale at auction of a seat in the stock exchange, solely, however, on the ground that he would not permit a public sale to be made under the sanction of the court in a case where the assignee could not undertake with the purchaser to deliver the thing sold. The question raised in this case was not deter-

mined, and that case was more nearly analogous to the case of *In re* Sutherland (*supra*) than to the present case.

The inclination of the courts in dealing with the question what passes by the assignment under Bankrupt Laws has been to give a most liberal construction to it for the benefit of creditors in order to carry into effect their obvious purpose and intent. Thus under the Bankrupt Law of 1800 it was held by the Supreme Court, reversing the decision of Mr. Justice Washington, that a claim against a foreign government, though a mere possibility of recovering through the future voluntary action of such government, was property that passed under the act. Technically it was nothing which the law for many purposes could recognize as having any existence as property, yet it was within the purview of the Act. (*Comegys* v. *Vasse*, 4 Wash., 570, 1 Pet., 193; and see, *Williamson* v. *Colcord*, 13 N. B. R., 319). I see no greater difficulty in the present case. It is true that the right of the bankrupts to assign was subject to the approval of the city; but so is the right of the lessee to assign his term often so subject to the approval of the lessor. The lease nevertheless passes in bankruptcy if the assignee chooses to take it. It is also true that this permit or license is revocable at the will of the city. I do not think, under the circumstances of this case, this incident of the thing takes it out of the purview of the Bankrupt Law. The words denoting property in the law are, it seems to me, not to be technically construed. Here was an existing valuable right, perhaps it may be called a chose in action, or existing contract of value, which, except in case of possible action by the city, would continue to be in their hands, and has in fact continued to be for all practical purposes business capital. To allow the bankrupts to hold it would encourage such debtors as should be disposed to defraud their creditors to make similar arrangements with their landlords, and thus lock up their business capital for their own use permanently, and make the Bankrupt Law, so far as they are concerned, a farce.

It is suggested in behalf of the bankrupts that any order the court may make will be a *brutum fulmen*; that the bank-

rupts are at liberty to procure at any time the revocation of their license, and the grant of a new license to some person friendly to them; that this would defeat any action the assignee in bankruptcy may propose to take, to realize on this asset if it be such. It is enough to say in relation to this suggestion, which indeed I do not understand to be in any sense a threat of what the bankrupts intend to do, but only an argument from what they may, as it is claimed, lawfully do, that the consequences of any interference with the action of assignee or the court in turning into money what is held to be property, whether such interference is direct or indirect, are likely to be very unpleasant. Such interference as is suggested, if it were attempted, would of course subject the bankrupts to proceedings for contempt.

Motion granted.

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SUPREME COURT—ILLINOIS.

JANUARY 25, 1879.

**A new promise to revive a debt discharged in bankruptcy must be clear, distinct, express, and unequivocal. If it is so it will revive the liability.**

## *ALVAH R. ST. JOHN* v. *WILLIAM STEPHENSON.*

SCHOFIELD, J.—Suit was brought by appellee against appellant, on a promissory note given by the latter to the former, on the 1st of November, 1864, for eight hundred and eighty dollars, with interest thereon at the rate of ten per cent. per annum, payable on demand.

Appellant pleaded his discharge as a bankrupt, by order of the District Court of the United States for the Northern District of this State, on the 10th of June, 1868.

Appellee replied a new promise to pay the debt, made subsequent to the discharge by the court in bankruptcy.

Judgment was rendered for appellee for the amount due on the note, after deducting certain credits.

The rule is, as stated by Mr. Justice Hunt in *Allen & Co.* v. *Ferguson* (18 Wall., 1), that "a promise by which a discharged debt is revived must be clear, distinct, and unequivocal. It may be an absolute or a conditional promise. But, in either case, it must be unequivocal. And the occurrence of the condition must be averred if the promise be conditional."

So, it has been held, the mere recognition or acknowledgment by a bankrupt of a debt which has been discharged by bankruptcy does not create a legal obligation on him to pay the debt. The promise must be express. (*Porter's Adm'r* v. *Porter*, 31 Me., 169; *Merriam* v. *Bailey*, 1 Cush., 77.)

And payment by the bankrupt of part of the principal of the original debt does not revive the obligation of the remainder (*Merriam* v. *Bailey*, *supra*; *White* v. *Cushing*, 30 Me., 267; *Stark* v. *Stinson*, 23 N. H. (3 Foster), 259); nor does the payment of interest on the entire sum of the principal. (*Com. Inst. for Savings* v. *Littlefield*, 6 Cush., 210.)

It seems to us that, notwithstanding the strictness of proof thus required, the jury were warranted in finding as they did.

Appellee positively swears that, in February, 1872, appellant told him that he would pay him every dollar of the note by July of that year. On cross-examination he gives the circumstances and language used, thus: "It was some time in February, 1872, that he promised to pay me in full. He came to my house and wanted the loan of a horse to go to Ontario. He said he had been up to old man Conkie's; had made the old man happy. Says he, 'I paid him seventy dollars; I got there before he was up,' and says he, 'I am going to settle some of these things that are hounding me;' and I just asked him if he had ever heard me hounding about money. He said, 'No, you never did; but," says he, 'I am going to pay you every dollar I owe you by the first of July.'" The evidence plainly shows that he owed him no debt but that embraced in the note in suit. It is difficult to conceive of a more clear, distinct, and unequivocal promise than this.

Appellee is corroborated by Ezra Chapman, whom appellant's counsel concede to be a most excellent and worthy man. Chapman says: "I knew that Mr. Stephenson, through borrowing money from, or using his brother-in-law's money, with St. John, got into trouble in the operation, as he had to raise the money. Mr. St. John was at my house, and in one conversation I asked him what he was going to [do] with Stephenson; and, if I recollect right, he said he was going to pay him, or help him." He thinks this was in the fore part of 1870—though he is not certain as to the year.

On cross-examination Chapman says: "He said 'I am going to pay; yes, I am going to help him.'" Samuel Chapman testifies that appellant told him that he was going to make it all right with Stephenson.

Appellant denies that he ever made an absolute promise to pay the debt, and says that all that he did was to promise to help him; that he was willing to help him, because of previous obligations; but that he always carefully refrained from making a promise to pay the debt, and never did make such promise.

The question of fact was fairly before the jury; and it would be invading their province to reverse the judgment, merely because we might think, on close balancing of the probabilities, the preponderance is with the appellant. It is impossible to say that there is a clear and decided preponderance of the evidence that way.

The judgment is affirmed.

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## UNITED STATES CIRCUIT COURT—N. D. ILLINOIS.

**The whole question of discharge is within the control of the court until the final disposition of the cause. At any time before a petition for discharge has been judicially determined, the bankrupt may be allowed to withdraw it and file a new one.**

**Payment by the bankrupt of the fees of the notary and register in taking proofs of claims, although done for the sole purpose of obtaining the con-**

**sent of creditors to his discharge, is not within the Statute (§ 5110) and will not prevent a discharge.**

## *In re SVEN SVENSON.*

THE bankrupt filed his petition for discharge in the District Court on the 27th day of March, 1878, returnable on the 4th day of May, 1878. On said last-mentioned day petitioners, creditors of bankrupt, appeared and objected to the issuing of the discharge on the grounds that the estate of the bankrupt, being voluntary, had not paid 30 per cent., nor had the bankrupt obtained the assent of a requisite amount in number and value of creditors who had duly proved their claims.

On the 25th of October, 1878, leave being given, the bankrupt withdrew his petition, and on the 13th of November, 1878, filed his second petition, returnable December 23, 1878. On said last-mentioned day he filed various proof of claims, and the requisite assent, in writing, of creditors, the bankrupt having employed an attorney to draw up the proofs, and also paid the notary and register's fees.

*B. M. Shaffner*, for bankrupt.
*T. S. McClelland*, for objecting creditors.

HARLAN, J.—The power of the District Court over the subject of the bankrupt's discharge was not exhausted on May 4, 1878. It is true that upon the showing then made a discharge could not have been granted. But there was no order or judgment at that time denying the application for discharge. The question of discharge was not judicially determined upon that application. The subsequent action of the court, allowing the bankrupt to withdraw his first petition for discharge and to file a new one, was not in violation of any provision of the Bankrupt Law. The whole question of discharge was within the control of the Bankruptcy Court until "the final disposition of the cause."

It appears that after the bankrupt obtained leave to file a second petition for discharge, he employed an attorney who

prepared proofs of eight claims against his estate, and the consent of such creditors to his discharge. He paid the notary his services for taking the proofs, and the register his fees for filing same. He bore the entire expense connected with the proofs of those claims, for the sole purpose of obtaining the consent of creditors to his discharge. The statute makes it a ground of objection to a discharge, "if a bankrupt, or any person in his behalf, has procured the assent of any creditor to his discharge, or influenced the action of any creditor at any stage of the proceeding by any pecuniary consideration or obligation;" (R. S., § 5110.) The present case is not covered by that statute. Certainly the bankrupt could rightfully ask the assent of creditors to his discharge. If they were unwilling to incur the expense of proving their claims, either because of their worthless character, or for other (to them) satisfactory reasons, the bankrupt, in order to obtain the benefit of their formal assent to his discharge, could bear the expenses of such proofs, without necessarily affecting his right to a discharge. In such case, it cannot be fairly said that the assent of creditors was procured, or their action influenced, by "any pecuniary consideration or obligation." The statute evidently refers to cases when the creditor receives himself some pecuniary or other substantial profit or benefit from the bankrupt, or from some one acting in his behalf, as the result or fruit of his action in the bankruptcy proceedings.

For these reasons, the court is of opinion that the action of the District Court was right. The petition for review is overruled, and it will be so certified to the court below.

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## UNITED STATES DISTRICT COURT—W. D. TENNESSEE.

MAY 6, 1879.

**In determining whether the assets are sufficient or the requisite assent of creditors obtained to entitle a voluntary bankrupt to a discharge, a debt proved after the day appointed to show cause against the discharge will not be counted.**

In re Read.

If a creditor wishes to influence the question of the bankrupt's discharge, he must prove his debt on or before the day appointed to show cause, or else he must appear on that day and enter his opposition for cause, and file his specifications within the time allowed for the purpose. Failing to take either of these steps, the weight of his claim is lost and the right of opposition gone.

## *In re D. P. READ.*

THE facts appear fully in the opinion.

*Wm. M. Randolph*, for the bankrupt.

HAMMOND, J.—The petition for discharge having been filed, the 4th day of January, 1879, was assigned for hearing it, before the register, at Trenton, when and where all creditors were notified by publication, as required by law, to attend and show cause why the discharge should not be granted; the same time and place was appointed for the second and third meeting of creditors.

No debts had at that time been proved, nor did any creditors appear at this meeting either to prove their debts or to oppose the discharge; but subsequently, on the 9th day of January, 1879, M. L. Meacham & Co. proved their debt and filed it with the register on the 22d day of January, 1879. The amount of their debt is one thousand five hundred and twelve dollars and thirty-five cents, upon which the assignee paid all the money in his hands, being the sum of ninety-five dollars. No other creditors have proved their debts. This payment not amounting to thirty per centum of the debt proved, and there being no assent of creditors, the question is, whether the bankrupt is entitled to his discharge. The register certifies the facts in his final report and submits the question. For the bankrupt it is insisted that the debt proved cannot be counted because the proof was made and filed after the date to show cause; that while it may be true that a creditor may prove at any time before final distribution for the purpose of receiving dividends, the question of the bankrupt's discharge is to be determined by the facts as they existed on the day to

show cause; and the right to a discharge having once attached is complete, and not to be defeated by subsequent proofs of debt.

I do not think the accidental fact that the second and third meeting of creditors was held under General Order No. 25 on the same day appointed for the creditors to appear and show cause against the discharge can influence the question submitted by the register. These meetings were held only for the purpose prescribed in Sections 5092 and 5093 of the Revised Statutes, but for convenience were assigned for the same day as that appointed under Section 5109 for the creditors to show cause against the discharge. Section 33 of the original Act of 1867 (R. S., 5112), as amended by the act of July 27, 1868 (15 Stat., 228), required the assent of creditors to be filed in the case at or before the time of the hearing of the application for discharge; and, as it required the assent only of the creditors who shall have proved their claims, it is manifest that under that section no other creditors could be counted, in determining whether the requisite assent had been given, except those who had, at or before that time, proved their claims (*In re* Borst, 11 N. B. R., 96), and although Section 9 of the Act of June 22, 1874 (18 Stat., 180), does not prescribe the time within which the assent must be given with the same particularity, it has been ruled that there has been no change of the original in that respect. (*In re* Derby, 12 N. B. R., 241.)

Again, by General Order 24, a creditor opposing the discharge for cause, under Sections 5110 and 5111, must appear and enter his opposition on the day when the creditors are required to show cause. This day, then, seems to be the time fixed for the termination of the right of the creditors to make whatever opposition they have to offer. The act can have no other meaning. It is for this purpose the creditors are notified, and it has been held, after careful consideration of the cases, that creditors who have been duly notified, and make no opposition, are to be regarded as consenting to a discharge. (*In re* Antisdel, 18 N. B. R., 289.)

I cannot see why the same principle does not apply here.

Before this debt was proved, and at all times after the expiration of the day appointed for the creditors to show cause, until this proof of debt was filed, the bankrupt was entitled, on the record as it stood, to his discharge, there being no debts proved and no opposition made. If the case had been brought to the attention of the court within those dates, he would have been discharged before this proof of debt was filed. He cannot be now defeated of his discharge by filing a claim too large to bring his case within the amount of assets required to entitle him to a discharge.

A creditor, if he wishes to influence the question of the bankrupt's discharge, must prove his debt on or before the day appointed to show cause, so that it may be reckoned in determining whether the assets be equal to thirty per centum of the claims proved, or counted against it if he withhold his assent in writing, or else he must appear on that day and enter his opposition for cause, and file his specifications within the ten days allowed for the purpose. Failing to take either of these steps, the weight of his claim is lost and the right of opposition gone. He must then be regarded as consenting to a discharge, although he subsequently proves his debt and receives less than thirty per centum of his claim.

Discharge granted.

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UNITED STATES DISTRICT COURT—NEW JERSEY.

MAY 31, 1879.

**It is the right of even a small minority of the creditors present at a composition meeting to insist upon the opportunity for an examination of the bankrupt before a vote is taken; but such right is waived by moving for a vote before such examination has been had.**

## *In re LITTLE.*

ON exceptions to recording resolution for composition.

*Mr. Regensburger*, of New York, for bankrupt.
*Mr. Meyers*, of New York, and *Mr. Colton*, for creditors.

NIXON, J.—The objections to recording the resolution on the ground that the bankrupt had not been examined came too late. An opportunity for his examination is doubtless the right of all creditors, but it is a right which may be waived, and the register's report of the proceedings of the last meeting shows a legal waiver.

It appears by that report that the attorney for the bankrupt was desirous of an adjournment owing to the necessary absence of the bankrupt, who has been subpœnaed to attend as a witness in a case pending before a United States Commissioner in the city of New York, the reason assigned for such adjournment being that some of the creditors might desire the examination of the bankrupt before voting upon the resolution.

The opposing creditors then refused to assent to an adjournment, and the register declined to grant it, but acceded to the request of the counsel of the bankrupt for a recess of one hour. On the creditors re-assembling at the end of the recess, Mr. Reeve, attorney in fact of the great body of the bankrupt's creditors, moved: "That Mr. Little be excused from attendance at the meeting because of his engagement before the U. S. Commissioner under the subpœna referred to, and because the creditors do not care to have him examined." It does not appear that any vote was taken upon the resolution, nor that any objections were made to it, but the register proceeds to say that Mr. Regensburger presents on the debtor's behalf a statement of assets and debts. The proposal is then read, the resolution passed and the vote is taken thereon. . . . . The register rules that after a vote the resolutions have been passed by a majority in number and three-fourths in value of the creditors present at the first meeting. The register then asks if any objections to the resolutions or other objections for certification to the judge are desired to be made by any person present. Mr. Colton, attorney for some of the creditors, states that if he has any objections he make the same to the court on the hearing. The register says that if any objections are to be made, they should now be presented to the register and ruled upon by him before being submitted to the judge. Mr. Meyers

presents two objections in writing on behalf of James Patton, an opposing creditor, to wit:

1. To the taking of any vote of creditors until the examination of the bankrupt is had and concluded.

2. To the proceeding of the meeting, on the ground that the bankrupt is not present, and has shown no excuse for such absence.

The provisions of the section in regard to composition proceedings are that, "the debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same and shall answer any inquiries made of him, and he, or if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due."

Under such provisions it was undoubtedly the right of even a small minority of the creditors to insist upon the opportunity for an examination of the bankrupt before a vote was taken, and this court has uniformly respected the right of the minority in this respect. I must assume, however, that the register has correctly reported the proceedings, and it appears from them that the parties who now oppose the recording of the resolutions because the bankrupt has not been examined, are the same parties that opposed the adjournment, and insisted upon a vote upon the resolutions in the face of the bankrupt's offer to come on the next day to offer himself for an examination. The court cannot permit such experimenting. They made their election to act upon the resolutions, knowing that no examination had been had, and it is now too late to object on that ground.

No other objections have been exhibited, and no satisfactory reason appearing to the contrary, it is ordered that the resolutions be recorded.

UNITED STATES DISTRICT COURT—VERMONT.

JULY 8, 1879.

To constitute an attachment of personal property the officer must actually take it into his custody or control; the mere taking of a receipt from a receiptor does not constitute an attachment of the property named therein.

More than four months before the commencement of the proceedings in bankruptcy, the sheriff, having writs of attachment against the bankrupt, took receipts from the bankrupt and another for certain specified property without taking possession thereof, and made return that he had attached it. The assignee found the property in the bankrupt's possession and took it. *Held*, that the sheriff's proceedings created no lien upon the property as against bankruptcy proceedings.

## *In re GEORGE ASHLEY.*

THE facts appear fully in the opinion.

*Park Davis* and *W. L. Burnap*, for assignee.
*C. W. Witters*, for petitioner.

WHEELER, J.—The petitioner, John H. Boothe, a Deputy Sheriff, having writs of attachment in his hands against the bankrupt, without taking possession of any property, took a receipt for certain specified property, signed by the bankrupt and another, and made return that he had attached it more than four months before the bankruptcy proceedings. The assignee found the property in possession of the bankrupt and took it. This petition is brought to enforce a lien upon the property by force of these proceedings. The bankrupt law leaves *attachments* in force when made a sufficient length of time before the commencement of bankruptcy proceedings. To constitute an attachment of personal property the officer must actually take it into his custody or control. (*Lyon* v. *Rood*, 12 Vt., 233; *Soules* v. *Austin*, 35 Id., 519.) This was not done here. The officer took a receipt which conclusively estopped the receiptors from denying that there was an attachment. This did not make an attachment in fact, it only affected the personal liability of the receiptors. Their liability rested

wholly in contract. (*Soules* v. *Austin*, 35 Vt., 519.) The officer accepted their personal liability in place of taking the property. This left no lien upon any property as against bankruptcy proceedings. (*Zollar* v. *Janvrin*, 49 N. H., 114; *Carpenter* v. *Turrell*, 100 Mass., 450.) This is just, too. If the property had been taken into the custody of the officer other creditors might, and probably would have found it out and commenced proceedings in season to cut the attachment off. If the mere giving a receipt would answer, they might be deceived into letting it run too long.

Petition dismissed.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

MAY 20, 1879.

Where payment of the dividend to a creditor is delayed through the action of the other creditors, or of the trustee, in objecting to his claim, interest should be allowed from the time the dividend became payable.

Where the trustee has not applied to have the creditor's dividend deposited to abide the result of the proceedings for its re-examination, and no particular moneys have ever been set aside as constituting such dividend, the creditor is entitled to interest at the rate allowed by the laws of the State.

## *In re HENRY KITZINGER and MORITZ KITZINGER.*

THE facts appear fully in the opinion.

*F. N. & C. W. Bangs*, for creditors.
*Jas. Dunne*, for trustee.

CHOATE, J.—In this case the proof of claim by one Goldman was objected to by the trustee, but upon re-examination has been sustained as valid. The amended proof of claim on which the creditor is now held to have been entitled to his div-

idend was then payable. He now asks for an order that he be allowed interest on his dividend from the time it became payable to the present time. There are sufficient assets in the hands of the trustee to pay this interest as well as the dividend itself. The application seems to be novel, and the diligence of counsel has not discovered any precedent either sustaining or forbidding the allowance of such interest. The Bankrupt Law clearly contemplated an equal *pro rata* distribution of the assets as between creditors. This equal distribution is certainly not distributed if interest is not allowed to those creditors, the payment of whose dividends is delayed through the action of other creditors in objecting to their claims. The payment of this creditor's dividend with interest now gives him, in contemplation of law, no more than the payment of their dividends to the other creditors in September, 1878, without interest gave to them. Unless interest is allowed the distribution is in a strict and proper sense unequal. If the delay were voluntary on the part of the creditor, of course he would have no claim to interest; but his dividend has been withheld upon the motion and for the benefit of the trustee, acting for all the other creditors, and it is just and right as against them that when his dividend is paid it should be made equal to theirs, and this can only be done by giving him interest. It is not true, as suggested, that a part of the estate is thereby taken from them and given to him. It is true the amount of this interest is taken out of the assets and given to him to equalize his dividend with theirs; but he shares equally with them in making this contribution, since he equally with them loses the right of sharing in it as assets to be distributed among all the creditors by way of a dividend. I see nothing in Rev. Stat., Section 5985, which shows an intention that interest should not be allowed in such a case. That section declares that the final judgment of the Circuit Court in an appeal from the decision of the District Court upon the validity of a proof of claim shall be conclusive, and that the prevailing party shall be entitled to costs. It is argued that this excludes the allowance of interest for delay in payment of a dividend pend-

ing such an appeal. I do not think such an inference can fairly be drawn from its terms—the rule *expressio unius exclusio alterius* does not apply except where it may fairly be supposed that the matter claimed to be excluded by inference from that included in the statute was in the mind of the legislator at the time of framing the statute. It seems to me that there is nothing in this section which indicates that the framers of this section had in mind this matter of equalizing the payments of dividends where there had been enforced delay in their payment. This section did not have to do with *dividends*, but with *proofs of debt* and their re-examination, and it would be too remote and doubtful a construction to infer from the allowance of costs an intention to disallow any equitable claim for indemnity which the principle of *pro rata* distribution, otherwise plainly declared in the same statute, might make just and proper. It is suggested that the fund in the hands of the trustee has not earned interest, and that if it had been put at interest in place of deposit which the court would have approved, it would have earned not more than two or three per cent. per annum, and it is therefore urged that if interest is allowed it should not be at a higher rate than the fund would have earned. Perhaps if the trustee had applied to have this creditor's dividend deposited in a trust company to abide the result of the proceeding for its re-examination, there might be no just claim beyond the interest earned on it; but as that was not done, and no particular moneys have ever been set aside as constituting this creditor's dividend, he is entitled to have that sum which by the laws of New York makes good to him an equal dividend *pro rata* with the other creditors—that is, the original amount of the dividend, and interest at the current rate allowed by the laws here in force for delay in payment.

Order accordingly.

The Atlas National Bank v. The F. B. Gardner Co. et al.

The individual bankruptcy of a person who is a stockholder in, and a director and officer of a corporation which is *not* in bankruptcy does not incapacitate him from exercising his functions as such officer of the corporation to such extent as to render inoperative and void as to third parties the acts and conveyances of the corporation when done and executed through him as its representative. 213

Pierce v. Shippee.

Not every debt where there is confidence reposed is a fiduciary debt within the meaning of the Bankrupt Law. A debt contracted under a contract providing for a limited partnership is not a fiduciary debt. 221

*In re* Gallagher & Lane.

The bankrupts owned a license or permit to occupy certain stalls in Washington Market in the city of New York. This license was revocable at the will of the city, and its assignment gave the assignee no rights unless consented to by certain municipal officers. It appeared that the bankrupts paid the sum of four thousand dollars for said license, and that it could be sold for nearly as much, and that the creditors had been induced to give the bankrupts credit partly on the ownership of these rights. The city having refused to recognize the rights of the assignee under his general assignment, the latter moved for an order to compel the bankrupts to transfer their license to him. *Held*, That the motion should be granted; that the license was properly within the purview of the Bankrupt Law and passed to the assignee.
*In re* Sutherland, 6 Biss., 526, distinguished. 224

St. John v. Stephenson.

A new promise to revive a debt discharged in bankruptcy must be clear, distinct, express, and unequivocal. If it is so it will revive the liability. 227

*In re* Sven Svenson.

The whole question of discharge is within the control of the court until the final disposition of the cause. At any time before a petition for discharge has been judicially determined, the bankrupt may be allowed to withdraw it and file a new one.
Payment by the bankrupt of the fees of the notary and register in taking proofs of claims, although done for the sole purpose of obtaining the consent of creditors to his discharge, is not within the Statute (§ 5110) and will not prevent a discharge. 229

*In re* D. P. Read.

In determining whether the assets are sufficient or the requisite assent of creditors obtained to entitle a voluntary bankrupt to a discharge, a debt proved after the day appointed to show cause against the discharge will not be counted.
If a creditor wishes to influence the question of the bankrupt's discharge, he must prove his debt on or before the day appointed to show cause, or else he must appear on that day and enter his opposition for cause, and file his specifications within the time allowed for the purpose. Failing to take either of these steps, the weight of his claim is lost and the right of opposition gone. 231

*In re* Little.

It is the right of even a small minority of the creditors present at a composition meeting to insist upon the opportunity for an examination of the bankrupt before a vote is taken; but such right is waived by moving for a vote before such examination has been had. 234

*In re* George Ashley.

To constitute an attachment of personal property the officer must actually take it into his custody or control; the mere taking of a receipt from a receiptor does not constitute an attachment of the property named therein.

More than four months before the commencement of the proceedings in bankruptcy, the sheriff, having writs of attachment against the bankrupt, took receipts from the bankrupt and another for certain specified property without taking possession thereof, and made return that he had attached it. The assignee found the property in the bankrupt's possession and took it. *Held*, That the sheriff's proceedings created no lien upon the property as against bankruptcy proceedings. 237

*In re* Henry & Moritz Kitzinger.

Where payment of the dividend to a creditor is delayed through the action of the other creditors, or of the trustee, in objecting to his claim, interest should be allowed from the time the dividend became payable.

Where the trustee has not applied to have the creditor's dividend deposited to abide the result of the proceedings for its re-examination, and no particular moneys have ever been set aside as constituting such dividend, the creditor is entitled to interest at the rate allowed by the laws of the State. 238

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# SYNOPSIS OF CASES, No. 6.

**Platt, assignee, v. Preston et al.**

A general assignment for the benefit of creditors without preferences is necessarily a fraud under the Bankrupt Law.

The bankrupt, who was a brewer, in March, 1878, gave to one P. a chattel mortgage for thirty thousand dollars on his machinery and other personal property, to secure payment of an amount then due, and also for future consignments of malt. This mortgage was not filed, and on the 14th of August was assigned by P. to one W., who gave therefor his promissory notes for thirty thousand dollars. W. had not sufficient means to pay said notes, unless the mortgaged property proved to be nearly worth the amount he gave for it. At the time of this assignment the bankrupt was insolvent. W. filed the mortgage on the 15th of August, foreclosed it, and, at the sale on the 20th, purchased the property for thirteen thousand dollars. On the same day the bankrupt leased the brewery for an alleged adequate rent to W., who took possession, and carried on the business in the name of the bankrupt's son. On the same day also the bankrupt made a general assignment to one D., his bookkeeper, and a person of no pecuniary means, who never gave the bond required by law. On the 31st of August a petition was filed by creditors, on which the bankrupt was adjudicated. On a motion for an injunction and a receiver, made in a suit brought by the assignee to recover the property, *Held*, That the motion should be granted; that the bill was not multifarious, the acts of all the defendants being charged to have been done with a common purpose, and the object of the bill being single—viz.: to recover the estate and clear it of the apparent encumbrances created by the several instruments sought to be set aside; that the assignment and lease were clearly indicative of actual fraud on the creditors; that, while the mortgage was not a fraudulent preference under the Bankrupt Law, by reason of its subsequent filing, or of its being kept secret to induce credit, yet, under the laws of New York, it was void as to creditors, and their rights as to the property covered by it passed to the assignee, and can be enforced by him. 241

*In re* **Henry Troth.**

The court may give effect to composition proceedings in cases of voluntary bankruptcy, although the bankrupt has by his own acts and conduct deprived himself of the right to obtain a discharge. 253

*In re* **William Lalor.**

The bankrupt was adjudicated by default April 6, 1878, upon petition of his creditors. The act of bankruptcy charged was the suspension of commercial paper made or passed in his business as merchant or trader. In December, 1878, a petition to set aside the adjudication was filed, which alleged that the bankrupt himself procured the original petition to be executed and filed, well knowing that its statement as to the petitioners constituting the requisite number and amount was untrue, and that he was not a merchant or trader, with intent to procure a discharge without obtaining the assent of his creditors requisite in voluntary proceedings, and charged collusion between him and the petitioning creditors in executing and causing to be filed a false petition. The bankrupt answered, denying all fraud or intention to deceive the court. It appeared that the bankrupt caused the petition to be prepared and presented to the petitioning creditors, who signed and verified it, and returned it to the bankrupt's attorney without making any inquiry into its truth. *Held*, That

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

FEBRUARY 6, 1879.

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## *JOHN H. PLATT, Assignee, etc.*, v. *WILLIAM T. PRESTON et al.*

THE facts appear fully in the opinion.

*A. Blumensteil*, for complainant.
*B. F. Tracy*, for defendant Preston.
*Van Alstine & Rass*, for defendant Diekelman.
*F. W. Angel*, for defendant Weinfeld.

CHOATE, J.—This is a motion for an injunction and receiver *pendente lite*.

Platt v. Preston et al.

The suit is in equity by the assignee in bankruptcy of one Newman, to recover the property of the bankrupt, alleged to have been transferred in fraud of creditors.

The bankrupt was a brewer, owning and carrying on a brewery. The defendant Preston is a maltster, and in July, 1877, upon the recommendation of the defendant Weinfeld, Preston began to supply the bankrupt, Newman, with malt, upon a credit of four months, and he continued so to trade with him till March, 1878. In March, 1878, the bankrupt desired a larger credit, running up to thirty thousand dollars or more, and he gave Preston a chattel mortgage on the machinery and other personal property connected with his brewery, to secure the amount already due, and such further amounts as should become due in that business, and, as a part of the same agreement, Preston was to consign to the bankrupt malt to be manufactured into beer by the bankrupt, at his own cost and expense, for Preston's account, to be sold by the bankrupt, and the proceeds paid to Preston to the extent of an indebtedness which might exist for the malt so consigned. The chattel mortgage secured the performance of this agreement as well as the moneys already due for malt. The brewery and all the property mortgaged remained in the possession of the bankrupt, and the chattel mortgage was not filed as required by the Statute of New York.

By the 1st of August, the indebtedness of the bankrupt to Preston had increased to about thirty-two thousand dollars. The bankrupt had become slow in meeting the payments due under the agreement, and on the 14th of August Preston assigned his mortgage and agreement, and the debt secured by it to the defendant Weinfeld, taking, in consideration therefor, Weinfeld's promissory notes for thirty thousand dollars, without other security. Weinfeld was a merchandise broker, having some means, but not enough to meet these notes, which were made payable within a few months, unless the mortgaged property proved to be very nearly worth what he gave for it. Weinfeld swears that as soon as he bought the mortgage, he went and examined the bankrupt's premises, and that, in con-

sequence of finding in the brewery only three thousand four hundred barrels of beer, whereas the bankrupt had shortly before represented to him that there were six thousand barrels, he determined to foreclose immediately. Accordingly, he filed the mortgage on the 15th of August, and went through the process of foreclosing it according to the laws of New York, advertising the sale in one obscure paper called the "Daily News."

The sale was on August 20th, and Weinfeld became the purchaser for about thirteen thousand dollars, and immediately after took possession, and since that time has carried on the business under the name of the bankrupt's son, paying over to Preston the proceeds of the business in payment of his notes. On the same day, August 20th, the bankrupt made a voluntary assignment of all his property, for the benefit of his creditors, to the defendant Diekelman, his bookkeeper, a person of no pecuniary responsibility, and who has never given bonds or otherwise complied with the Statutes of New York in respect to such assignments. The assignment included the books of the bankrupt. On or about the same day, the 20th of August, the bankrupt executed a lease of the brewery to Weinfeld for what is alleged to be an inadequate rent.

From the 14th of August Newman was insolvent, and a petition was filed by his creditors, August 31st, on which he has been adjudicated a bankrupt. The bill charges a combination and fraudulent purpose on the part of Preston, Weinfeld, and Diekelman, by means of the secret mortgage, the general assignment and the lease, to defraud the creditors of the bankrupt, and to defeat the operation of the Bankrupt Law, and to secure a preference to Preston, and it seeks to set aside the mortgage, the assignment, and the lease.

It is objected by the defendants that the bill is multifarious. This is clearly not so. Although the several defendants are charged with acts of fraud affecting different parts of the estate of the bankrupt, yet their acts are charged to have been done with a common purpose, and the object of the bill is simply to recover the estate, and clear it of the apparent en-

cumbrances and titles created upon it by the several instruments sought to be avoided. The bill is sustained by the well-considered cases of *Boyd* v. *Hoyt* (5 Paige, 65), and *Fellows* v. *Fellows* (4 Cow., 682).

As to the general assignment, it is insisted that it is not *per se* a fraud upon the Bankrupt Law, but void if actual intent to defraud or to defeat the law shall be shown. This may still be regarded as being an open question in the Supreme Court of the United States. (*Mayer* v. *Hellman*, 13 N. B. R., 440, 1 Otto, 496.) But the great weight of authority at present is, that a general assignment for the benefit of creditors without preferences is necessarily a fraud under the Bankrupt Law, defeating the operation of the law, because it provides for the administration of the estate in a different way from that provided by the Bankrupt Law, and by an assignee selected by the bankrupt himself. (*Globe Insurance Co.* v. *Cleveland Insurance Co.*, 14 N. B. R., 311; *Macdonald* v. *Moore*, 15 Id., 26; *In re* Biesenthal, Id., 228.)

The complainant, therefore, is entitled to a receiver of the property that passed by the assignment. The circumstances attending the making of the general assignment, and the contemporary lease, were too clearly indicative of actual fraud upon creditors to be overborne by the denials of Weinfeld and Diekelman, and therefore the motion is granted as to the general assignment and the lease.

The real question in the case is whether, on the facts shown, the complainant is entitled to an injunction and receiver in respect to the property covered by the chattel mortgage. It is claimed, on the part of the complainant, that he is entitled to the relief asked on three grounds: first, because the chattel mortgage is to be considered as having been given at the date of its filing, and that the giving of it then would have been, and, therefore, the filing of it was a fraudulent preference, which the assignee in bankruptcy can set aside; and secondly, because the evidence warrants the conclusion that the mortgage was kept secret by Preston, with a fraudulent intent toward the creditors of Newman, and to induce a false

credit whereby he might continue along in business, and so pay Preston's debt; and thirdly, because, as to creditors, the Statute of New York makes an unfiled chattel mortgage, where the mortgagor retains possession, void; and that creditors whose debts exist prior to the filing or taking possession, have such an interest in or claim to the property mortgaged, that the assignee in bankruptcy, though his title accrues subsequently to the filing or the taking possession, may recover the property as property transferred in fraud of creditors.

As to the first and second of these claims they are, I think, conclusively disposed of by the decision of the Supreme Court of the United States in the recent case of *Sawyer* v. *Turpin* (13 N. B. R., 271, 1 Otto, 114). In that case it was held that a chattel mortgage, within the period when it might have been held an unlawful preference, and given and received with knowledge of the debtor's insolvency, was not a preference within the prohibition of the Bankrupt Law, although it was given in exchange for an earlier mortgage which was never recorded, and which, by the law of the State, was "not valid against any person other than the parties thereto."

It was held that each earlier unrecorded mortgage being valid as *between the parties* was a sufficient consideration for the new mortgage, and that the transaction was an exchange for value, and not a preference for a pre-existing debt, and that it was not in conflict with provisions of the Bankrupt Law which avoids preferences, "the purpose of which is to secure a ratable distribution of the property of a bankrupt, owned by him at the time of his becoming bankrupt, and undiminished by any fraudulent preferences given within four months prior thereto." And it was further said by the court, that it would make no difference in the result that the mortgage had been purposely kept secret in order to induce false credit to the bankrupt, because "the Bankrupt Act was not intended to prevent false credits." Its purpose is ratable distribution.

The neglect of Preston therefore, or even his intended failure to file his chattel mortgage down to a time when he may have known of Newman's insolvency, cannot be held to make

the filing of it the giving of a new security, or to make it void in his hands as against the assignee in bankruptcy, by reason of such failure to file it being a fraud upon creditors, which it was within the purview and meaning of the Bankrupt Law to recognize as a ground of recovery of the property as fraudulently transferred, or as a preference. The rule thus declared in *Sawyer* v. *Turpin* was followed by the District Court for the Eastern District of Michigan, in the case of *In re* Barman (14 N. B. R., 125), where it was held that the failure to file a chattel mortgage until within four months before the bankruptcy, and until after knowledge of the insolvency of the mortgagor, did not make it a fraudulent preference.

It remains to consider whether, independently of the provisions of the Bankrupt Law avoiding fraudulent preferences, any right or interest vested in the assignee, in the property covered by this mortgage, which he can enforce against the mortgagee for the benefit of the creditors of the mortgagor. It is to be observed that the case of *Sawyer* v. *Turpin* arose under the law of Massachusetts, whose statute provides that "unless a mortgage is so recorded, or the property mortgaged is delivered to, and retained by the mortgagor, it shall not be valid against any person other than the parties thereto."

And in the construction given to this statute by the highest court in that State, it had been held that notwithstanding the declared invalidity of the mortgage as against creditors, yet that the mortgagee could file it, or could take possession at any time, and thereupon his title became perfect as against any creditor of the mortgagor, unless such creditor had acquired a specific lien or title to the property by attachment or execution prior to the filing or the taking of possession, and that under the State Insolvent Law the assignee could not recover the property for the benefit of the creditors, unless his title accrued before the filing, or the taking possession. (*Mitchell* v. *Black*, 6 Gray, 100.)

The question in the present case is whether, under the Statute of New York, creditors have a different, and a larger interest, one that they can enforce, or that can be enforced by

their trustee, although they acquire no specific lien prior to the filing, or the taking possession by the mortgagor. The Statute of New York declares: "Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, hereafter made, which shall not be accompanied by an immemediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed, etc."

In the construction of this statute it has been expressly held by the Court of Appeals, that although a creditor is not in a position to raise the question of the validity of the chattel mortgage with the mortgagee until he has received judgment and takes out execution on his debt, yet, that having done so, his right relates back to the time of the contracting of the debt, and if at that time, or while the debt is in existence, the neglect to file the mortgage exists, he has a preference over the mortgagee in having the property applied to payment of his debt, even though the mortgage was filed before he obtained judgment; that this interest or right of the creditor is one that attaches to the debt, and accompanies it when transferred to another. And further, it was held that such right attaches to all the debts of the debtor existing during such default, and not merely to those contracted during the default, and the lien of the execution levied on the mortgaged property, though issued on a judgment recovered after the filing of the mortgage, was held superior to that of the mortgagee. (*Thompson* v. *Van Vechten*, 27 N. Y., 568.)

"It is argued," says the court, "that this embraces only creditors who have obtained judgments and executions during the time when the omission to file existed. If this were so, the act would not in many cases accomplish any beneficial purpose. One proposing to part with money or property to another under a contract to be repaid at a future time, could obtain no information for his guidance by a search at the proper office. But it was the apparent, and I think the real office of the act

to prevent the setting up of secret mortgages against persons who might deal with the mortgagor on the faith that his property was not thus encumbered." And from the peculiar language of the act, the court goes on to reason and decide that all the creditors of the mortgagor who were such during the existence of the default were intended to be included within its benefits. The interest then which a creditor of the mortgagor has in property transferred by an unfiled chattel mortgage in the State of New York, is quite different from that which, under the laws of Massachusetts, such a creditor has in such property so transferred in that State, and which the court had to deal with in *Sawyer* v. *Turpin* (*ut supra*). In that case the interest was a mere possibility of making the property subject to a lien to be perfected, and to attach to the property before the recording or taking possession—a possibility of an interest which was extinguished by a filing or taking possession before such lien should attach or become perfected.

In New York this creditor's interest is not so extinguished, but inheres in the debt, and may be afterwards perfected and made to attach by judgment and execution subsequently obtained and issued. The case of *Sawyer* v. *Turpin*, therefore, while it is conclusive that the Bankrupt Law does not of its own force make such subsequent filing a fraudulent preference, and does not by its own force avoid such a secret mortgage in favor of the creditors, on the ground that it created or induced a false credit, yet it is not conclusive that this interest of creditors in New York in the property covered by the mortgage may not pass to and be enforced by the assignee in bankruptcy for the benefit of creditors. This depends on the further question whether the assignment in bankruptcy is operative to vest this interest or power to sue in the assignee.

That the property so held under a secret mortgage is in New York held to be, and aptly described as property transferred in fraud of creditors, is shown as well by the reasons given in the case of *Thompson* v. *Van Vechten* for the decision above referred to, as by the terms of the Statutes of New

York avoiding conveyances as to creditors for failure to file or record the same. By the Revised Statutes (Section 5046) it is provided that all property conveyed by the bankrupt in fraud of his creditors shall be at once vested in the assignee by force of the assignment.

I cannot doubt that this includes property in which, by the local law, the creditors have, at the time of the bankruptcy, an existing interest as creditors of the bankrupt, or a right to have it applied to their debts as property declared by the laws of the State which govern their rights in it to have been conveyed in fraud of them, although the fraud be not one which is recognized and declared to be such by those provisions of the Bankrupt Law which invalidate conveyances as fraudulent against creditors.

The evident design of the statute is to secure the distribution among the creditors of all the property to which they are entitled as creditors of the bankrupt, and it should have a fair and beneficial construction to effect this purpose. I see no reason to believe that the Bankrupt Law was intended to take away from creditors any substantial right or interest in their debtor's property, which by the local law they have. Yet to hold that such an interest does not pass to an assignee in bankruptcy, is virtually to take such right or interest from the creditors and give it to a mortgagor, who, by the local law, is not entitled to it. If the bankrupt should be discharged, the debts being gone, of course all benefit to the creditors from their interest in this property will be gone. If the discharge shall not be granted, then possibly the rights of the creditors may revive, and they may compete with each other in a race of diligence to recover this property and so obtain unequal shares in the distribution of the bankrupt's estate, in obvious violation of the spirit and purpose of the Bankrupt Law.

It is, however, objected that this view is erroneous, because no creditor except after judgment can proceed to collect his debt out of the property so transferred, and that the assignee in bankruptcy does not stand in the place of a judgment creditor; that by the bankruptcy, which prevents judgments, the

rights of creditors are virtually extinguished, and the case of *In re* Collins (12 N. B. R., 379) is cited in support of this position. In that case it was indeed decided that no interest would pass to the assignee, for the reason that the creditors' interest has not become a specific lien for want of a judgment, but the doctrine of *Thompson* v. *Van Vechten*, that there is an inchoate but existing right or interest of the creditors in the property, is recognized as the law of New York. The court, however, seems not to have been referred to another statute of New York, passed in 1858, which provides that "any executor, administrator, assignee, or other trustee of an estate, or the property of an individual, may, for the benefit of creditors or others interested in the estate or property so held in trust, disaffirm and treat as void all transfers in fraud of the rights of any creditor or others interested, and maintain all necessary actions for that purpose." This act cannot be overruled in considering what is the precise nature of the interest of creditors in property so transferred, and what are the requisites made essential by the local law for the enforcement of the rights of creditors therein. In a very recent case the Court of Appeals have given a construction to this statute, and have held that this statute was designed for the benefit of all creditors having the right to payment out of their debtor's property so transferred; that its benefits are not limited to judgment creditors whose lien is specific and complete; that it obviates the necessity of judgments on the debts, and places the assignee or trustee in the place of all the creditors having such rights, and enables him to recover the property for their benefit; and that an assignee in bankruptcy is within its terms and entitled, under its provisions, to sue in the State Court; and the court very wisely remarks: "The policy of the Bankrupt Law is to secure an equal distribution of all the property of the bankrupt among his creditors, and this object would be defeated if a fraudulent assignor could set the bankrupt assignee at defiance and a fraudulent conveyance not be contested. Creditors could not well do it after a decree in bankruptcy. They would be practically remediless. The Bankrupt Court would be a place of refuge for every debtor who had fraudulently

disposed of his property, and the Bankrupt Act a perfect shield for fraud. The assignee represents the creditor's rights without the technical obstructions to the enforcement of those rights by a creditor at large." (*Southard* v. *Pinckney*, 5 Abb. N. C., 184.)

It cannot be said, therefore, since the statute of 1838, and especially since its interpretation in the case last cited, however it may have been before, and as the law of New York was presented to the court in the case of *In re* Collins, that the obtaining of a judgment is an essential ingredient in the interest of creditors in property so transferred, without which that interest becomes by the bankruptcy virtually extinct.

The Federal Courts follow the rulings of the highest State Court as to the interpretation of State statutes, and this decision is therefore conclusive as to the nature of this interest of creditors in property declared by the law of the State to be conveyed in fraud of creditors. And thus the technical difficulty, found by the court in the case of *In re* Collins to exist in the local law, has been effectually removed.

The views above expressed, as to the power of the assignee to sue, as the representative of the creditors to enforce their rights against property in which, by the local law, they have still an interest at the time of the bankruptcy, without the formalities of judgment or other proceedings by which creditors may obtain a perfect and specific lien which is prevented by the bankruptcy, are sustained by the following decisions among others: *Barker* v. *Smith* (12 N. B. R., 474); *In re* Leland (10 Blatch., 503); *In re* Gurney (15 N. B. R., 373). The cases of *Sawyer* v. *Turpin* (*ut supra*), and *Miller* v. *Jones* (15 N. B. R., 150), are clearly distinguishable on the ground that it was shown or assumed that by the local law the interest of the creditors had become extinguished prior to the bankruptcy. They do not militate against the proposition here advanced that if that interest survives to the creditors at the time of the bankruptcy the assignee is vested with a title or a right to sue, which enables him to enforce their rights as their representative.

The complainant may therefore, as representing the credi-

tors of Newman, attack the chattel mortgage, and he is entitled to an injunction and receiver in respect to the property covered by it.

It has not been necessary to discuss at length the evidence of actual intent to defraud creditors in this case. The proofs would not justify a finding that the chattel mortgage was not, in its inception, made in good faith, otherwise than as it may have been intended to keep it secret as regards creditors, or that Newman was then insolvent. And if Preston had, as is claimed, a right to file his mortgage at any time, and thereby totally extinguish the rights of creditors, I do not perceive that his knowledge of Newman's insolvency at the time of his filing it could affect his rights, or that he might not, with knowledge of such insolvency, assign his right in the mortgage to a person having notice of such insolvency. There is, however, strong reason to conclude, notwithstanding the denials of the parties, that Preston, Weinfeld and Diekelman were, from the time of the sale of the mortgage, on the 14th of August, acting in concert with each other, and with the bankrupt, to obtain payment of Preston's debt and to prevent the property from being distributed among the creditors under the Bankrupt Law. The sale of the mortgage by Preston to Weinfeld was made under circumstances which show that there was some purpose for it beyond what appears on the face of the transaction or is admitted by the parties. It is not our experience of human nature that men give up a good security for so large an amount for the mere promises of a third party having no apparent means to perform such promises, nor that men suffer so great and so rapid ruin as seems to have overtaken Newman between the 14th and the 20th of August, without resistance or protest, unless they are consenting parties to it. The whole series of transactions was apparently for the purpose of making a better and more defensible title against the creditors of Newman.

Motion granted. Order to be settled upon notice.

UNITED STATES DISTRICT COURT—NEW JERSEY.

APRIL 8, 1879.

The court may give effect to composition proceedings in cases of voluntary bankruptcy, although the bankrupt has by his own acts and conduct deprived himself of the right to obtain a discharge.

## *In re HENRY TROTH.*

On specifications against composition.

NIXON, J.—The most serious question arises from the fact that the petition was voluntary and was filed after the bankrupt had made an assignment under State law. A fair construction of the act in reference to a composition does not seem to preclude the court from giving effect to the proceedings in such cases, although the bankrupt has by his own acts and conduct deprived himself of obtaining a discharge in bankruptcy. So held, in *Re* Haskell (11 N. B. R., 164), and I can see no controlling reason why his conclusion should not be adopted as a proper interpretation of the law. Judge Blatchford went a step farther in *Re* Odell (16 N. B. R., 501), and decided that the refusal of the court to grant a discharge for a cause set forth in Section 5110 was not a bar to a composition subsequently agreed to by the requisite number of creditors. They are presumed to be familiar with all the facts, and if they assent to the composition with such knowledge, the court should assume that they understand their interests and that it will be best for all concerned, under the circumstances, that the resolution should be recorded, and it is so ordered.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JANUARY 23, 1879.

The bankrupt was adjudicated by default April 6, 1878, upon petition of his creditors. The act of bankruptcy charged was the suspension of commercial paper made or passed in his business as merchant or trader. In

December, 1878, a petition to set aside the adjudication was filed, which alleged that the bankrupt himself procured the original petition to be executed and filed, well knowing that its statement as to the petitioners constituting the requisite number and amount was untrue, and that he was not a merchant or trader, with intent to procure a discharge without obtaining the assent of his creditors requisite in voluntary proceedings, and charged collusion between him and the petitioning creditors in executing and causing to be filed a false petition. The bankrupt answered, denying all fraud or intention to deceive the court. It appeared that the bankrupt caused the petition to be prepared and presented to the petitioning creditors, who signed and verified it, and returned it to the bankrupt's attorney without making any inquiry into its truth. *Held*, That the papers made out a *prima facie* case against the bankrupt so as to warrant a reference to take the proofs.

Where a bankrupt procures a false and fraudulent petition to be filed by his creditors, with intent to procure a discharge which he could not obtain by voluntary proceedings, every movement he makes upon the basis of such petition is in contempt of court, and his proceedings to obtain a discharge will be perpetually stayed unless he shall comply with such reasonable terms for purging himself of the contempt as shall be imposed upon him.

The creditor who seeks to set aside the adjudication proved his debt in June, 1878. The petition alleged that the petitioner did not discover the alleged fraud and collusion before September 28th. The petition was filed December 9, 1878. *Held*, That there was no presumption, from his being a party to the proceedings, that he knew of the fraud before that time, and that the delay in filing the petition from September 28th to December 9th was not necessarily laches.

## *In re WILLIAM LALOR.*

THE facts appear fully in the opinion.

*J. H. Post*, for petitioner.
*Hal. Bell*, for bankrupt.

CHOATE, J.—This is a petition by a creditor of the bankrupt, who has proved his claim, wherein he seeks to vacate the order of adjudication or to obtain some other relief.

The bankrupt was adjudicated upon petitions of his creditors. The original petition was filed April 1, 1878. The order to show cause was made returnable April 6, 1878. The bankrupt made default, and was thereupon adjudicated a bankrupt. The creditor's petition was signed by three creditors, the aggregate of whose claims was three thousand seven hundred and forty dollars, and the petition contained the averment that petitioners believe that they constituted one-fourth in number and one-third in amount of all the creditors whose debts

were unsecured and provable in bankruptcy, and exceeding two hundred and fifty dollars.

The act of bankruptcy alleged was the suspension of commercial paper made or passed in the business of the bankrupt as a merchant or trader.

The present petition alleges that the bankrupt himself procured the execution of the original petition by the petitioning creditors, and that he caused it to be filed, well knowing that its statements as to the one-fourth and one-third of the debts was untrue, and that he was not a merchant or trader. It also charges collusion between him and the petitioning creditors in thus executing and causing to be filed a false petition, and alleges the intent to have been, so far as the bankrupt is concerned, by means thereof and of an adjudication thereon, to get a discharge from his debts without obtaining the assent of one-fourth in number and one-third in amount of his creditors. Other allegations as to the defects in the original petition it is not necessary to state here. It is alleged that, in fact, the bankrupt had sixty-five creditors, the aggregate of their claims being two hundred and ninety-three thousand six hundred and fifty-nine dollars and thirty-four cents. In support of the petition are the affidavits of two of the three original petitioning creditors, from which it appears very clearly that the original petition was not prepared at their instance, or by their procurement, but was prepared by the bankrupt or his attorney, and presented to them, at his request, for signature, and thereupon delivered by them to him, or his attorney, and that they, the petitioning creditors, employed no counsel or attorney in the matter. The third petitioning creditor refused to make an affidavit, but his statements to a witness are to the same effect as the sworn statements of the other two in the particulars above stated. The answering affidavits of the bankrupt and his attorney, and the statements to a witness of two of the petitioning creditors, deny the fraud charged, so far as the petitioning creditors are concerned, and their knowledge of the falsity of the original petition, leaving them in the position of having, at the bankrupt's request, signed and verified the pe-

tition through friendliness to him, without any inquiry into its truth. These papers show very clearly that the bankrupt procured the petition to be signed by them, and caused it to be filed, and that the petitioning creditors took no active part in the matter, except to sign and verify the petition and accompanying proof of debts, at the request of the bankrupt, or his attorney, and that while the petition was technically filed by them, that is, by an attorney nominally, and as matter of record appearing for them, he did so by procurement of the bankrupt himself. It is not denied that the number and amount of the debts is as stated in the present petition. The bankrupt denies all fraud or intention to deceive the court, so far as he is concerned, and alleges ignorance, in fact, as to the requisites of a creditor's petition. The present petition avers that the facts with respect to the alleged fraud and collusion and procuring of the petition to be executed and filed by the bankrupt therein were not discovered before September 28, 1878, and that the petitioner prepared and filed his petition as soon as practicable thereafter. The petition was filed December 9, 1878.

A reference is now asked to take proof of the facts. This is opposed by the bankrupt on the ground that the petitioner is not, upon the case stated upon his papers, entitled to relief; that as a party to the proceedings, since he had notice of the first meeting of creditors in April last, and especially since his proof of his debt in June last, he is chargeable with full notice of the number and amount of the debts of the bankrupt, and of the insufficiency of the original petition, and that his petition should be dismissed on account of his laches, and also on the ground that the only case in which an adjudication will be set aside is fraud and collusion, and the papers do not make out a *prima facie* case of such fraud and collusion. The principles governing this class of cases are well settled. Fraud alone is a sufficient ground for setting aside an adjudication, and the court holds parties making such an application to great diligence, and even if the fraud is made out, the court will refuse the relief in its discretion if intervening rights have attached, so that the guilty parties cannot be punished without involving therein innocent

third persons who may have relied on the record. (*In re* Funkenstein, 14 N. B. R., 213; *In re* Court, 17 Id., 555.) While it is settled that collusion alone between the debtor and petitioning creditors in carrying on the proceeding without intended fraud on the court is no ground for the refusing or for setting aside an adjudication (*In re* Duncan, 14 N. B. R., 18), yet no court is bound to lend its aid to a party before it in his attempt to obtain a judgment or decree favorable to himself by means of a deliberate fraud, which he has perpetrated, and through which he is still endeavoring to reach such decree or judgment. Now in the present case it is idle to claim that the debtor supposed or believed that the petitioning creditors were one-fourth in number and one-third in amount of his creditors. The disproportion is quite too gross to allow the possibility of mistake, and on the face of the papers as he states the case, it will require the strongest possible evidence to shield him from the charge of an intention to impose upon the court a false and fraudulent petition as the basis of the proceedings. And there is no apparent motive for such an act, except that suggested in the moving papers, that by having the proceedings in form involuntary he might go through bankruptcy without getting the assent of one-fourth in number and one-third in value of the creditors who might prove. If such was his purpose and intention, and such the means by which he has been and is still moving as a party to these proceedings to obtain his discharge, then although this petitioner, by reason of his laches, or by reason of the intervening rights of third parties, may fail in that part of the relief asked for which consists in having the adjudication set aside, yet it will not be out of the power of the court to give him some relief as against the bankrupt himself. It cannot be possible, if such a gross fraud is proved against the bankrupt, that the court will be obliged to grant *him* any relief in these proceedings.

Every movement he makes in the case, upon the basis of a petition so procured by him to be made and filed, and which he knew to be false, and intended by concealment of the truth and suggestion of falsehood to make the means of obtaining his dis-

charge, is in contempt of court. If he is thus in contempt, his proceedings herein to obtain a discharge will be perpetually stayed, unless he shall comply with such reasonable terms for purging himself of the contempt as shall be imposed upon him, as perhaps by obtaining the assent to his discharge of the same proportion in number and amount of his creditors as he would be required to obtain if he had filed a voluntary petition, and whatever other terms may be just. There is nothing in these provisions of the Bankrupt Law for granting a discharge which interferes with or prevents the exercise of this power by the court, for they do not take away or qualify the inherent power of the court to punish for contempt.

Of course it is not intended to prejudge the bankrupt's case. He must have the fullest opportunity to explain and justify his acts and show his good faith. All that is held is, that the papers make out a *prima facie* case against him so as to warrant a reference to take the proofs.

As to the question of guilty collusion on the part of the petitioning creditors and of laches on the part of this petitioner, they are matter of fact put in issue by the petition and answering papers. Although this petitioner may be found chargeable with notice as to the insufficiency of the original petition in number and amount of creditors, and in the averment of the act of bankruptcy from the time he proved his debt or before, yet there is no presumption, from his being a party to the proceedings, that he knew of this gross fraud now charged upon the bankrupt, and a delay in filing his petition from September 28th, when he alleges he first learned these facts, to December 9th, is not necessarily laches. An order will be made for a reference to take testimony.

## UNITED STATES CIRCUIT COURT—INDIANA.

SEPTEMBER, 1879.

**The 9th Section of the Act of June 22, 1874, necessarily repealed the proviso to Section 5112 of the Revised Statutes.**

In re Wheeler et al.

In any case of bankruptcy, where there are no assets equal to thirty per cent., if the bankrupt secures the assent of one-fourth of his creditors in number and one-third in value, he is entitled to a discharge irrespective of the time when the debts were incurred.

## *In re EDWARD E. WHEELER and JAMES B. RIGGS.*

THE facts appear fully in the opinion.

*P. Hornbrook*, for petitioners.
*Palmer & Iglehart*, for creditors.

DRUMMOND, J.—The bankrupts in this case made an application to the District Court to be discharged from all debts provable against them under the Bankrupt Act; and the discharge was refused for the reason that it was held by the District Court, that under the amendment of June 22, 1874, to the Bankrupt Law of 1867, they were restricted to the assent of creditors whose claims originated after the 1st of January, 1869. The court held that the proviso in the 5112th Section of the Revised Statutes still operated upon the amendment made in 1874, and the question in the case is, whether the Act of 1874 left that proviso in full force, or whether it was repealed by the later act. If repealed, then it is conceded that the bankrupts had complied with the law in force at the time of their application, and were entitled to a discharge.

It is undoubtedly a question of considerable difficulty, and upon which different opinions have been entertained by judges in administering the law.

It is, perhaps, unnecessary to refer to the previous legislation upon the subject. It is sufficient for our purpose to consider the section of the Revised Statutes, already referred to, as modifying the law upon the subject, at the time that the amendment of 1874 was adopted. The 5112th Section of the Revised Statutes was as follows: "In all proceedings in bankruptcy, commenced after the first day of January, 1869, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate,

upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, is filed in the case at or before the time of the hearing of the application for discharge; but this provision shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, 1869."

It will be observed that this section applies to all proceedings in bankruptcy without distinction, and it operates by way of prohibition upon the court, declaring that no discharge shall be granted under certain circumstances; the assets must be equal to fifty per cent. of the claims of a certain character, or the assent in writing of a majority in number and value of his creditors, under the terms there named, must be filed; and then there is a declaration or proviso that this shall not apply to those debts from which the bankrupt seeks a discharge, which were contracted prior to the first day of January, 1869.

The 9th Section of the amendment of the Act of June 22, 1874, is as follows: "That in cases of compulsory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner, and with the same effect, as if he had paid such percentage of his debts, or as if the required proportion of his creditors had assented thereto; and in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per cent. of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number and one-third in value, and the provision in Section 33 of said Act of March 2, 1867, requiring fifty per centum of such assets, is hereby repealed."

It will be observed that this section, as in cases of voluntary

bankruptcy, is like the section in the Revised Statutes which has been referred to, and operated by way of prohibition, stating that no discharge shall be granted to a debtor under certain circumstances; and, whereas, by the section in the Revised Statutes the assets were required to be equal to fifty per cent., in this amendment it is only necessary that they should be thirty per cent.; and as by the section in the Revised Statutes the assent of a majority of the number and value of creditors was required, in this amendment the assets of one-fourth in number, and one-third in value, was declared to be sufficient, and as to cases of involuntary bankruptcy, the amendment declares that the payment of any proportion of the debts, or the assents of any portion of the creditors, was unnecessary.

It is a circumstance which should not be overlooked in the consideration of the question that the last clause of the 9th Section of the Act of the 22d of July, 1874, expressly repeals a provision in Section 33 of the Act of March 2, 1867, requiring fifty per centum of the assets, and it seems an argument of weight, that where an amendment repealed, expressly, a particular provision of a previous law, and did not repeal the proviso in the section of the Revised Statutes, to which reference has been made, that it was intended by the law-maker that the latter should remain in force. But we can look to the particular phraseology of the last clause of the section of the Revised Statutes in order to determine whether or not it was the intention of Congress it should remain in force, or whether, on the other hand, it was its purpose then to legislate fully, both as to voluntary and involuntary bankruptcy.

The statement in that clause is that "*this* provision shall not apply" to certain debts—the provision as it was then declared to exist. Now, was it the intention of Congress, after declaring in the 9th Section of the Act of June 22, 1874, under what circumstances parties, in cases as well of voluntary as involuntary bankruptcy, should be discharged, that there was to be added to that part of the section which refers to the discharge of voluntary bankrupts, the last clause of the section of the Revised Statutes which has been referred to? If so, then we

should have to say there was incorporated in the amendment that language, and that Congress intended to say, "this provision shall not apply to certain debts"—meaning thereby the provision contained in the amendment of 1874. It would seem, in the absence of any express declaration to that effect, that when Congress had changed the law as it stood in relation to discharges in voluntary cases that if it had intended that the provision in the original law should still adhere to the law as amended, there would have been some clear declaration or intimation of that purpose. Undoubtedly it was not necessary in terms to repeal that part of the previous act of the amendment requiring fifty per cent. of the assets; because the first part of the 9th Section having legislated upon the cases of involuntary bankruptcy, as to that the general repeal in the 21st Section of the Act of June 22, 1874, would have operated upon cases of involuntary bankruptcy—but I am not prepared to admit that the mere fact there was this express repealing clause is conclusive that Congress did not, by the amendment as to voluntary cases, intend to repeal the provision in the section of the Revised Statutes referred to.

On the contrary, admitting that the subject is one of difficulty, it seems to me that the fair construction of the amendment of 1874 leads to the conclusion that Congress intended to cover the case of voluntary as well as involuntary bankruptcy, and to bring within the terms of the amendment the circumstances under which, as well in the one case as in the other, the bankrupt could or could not be discharged. It may be admitted that a repeal of a prior statute by a subsequent one, by implication merely, is not encouraged by the courts, and it must appear from the later statute where the repeal is claimed to exist by implication, that it was clearly the intention of the law-maker not to leave the prior statute in force. But when we look at the whole scope of the amendment of 1874, and apply the language of the 9th Section to the case now before the court, it seems to me that it was the intention of Congress to declare by that section that, in any case of bankruptcy where there were no assets equal to thirty per cent., if the bankrupt

secured the assent of one-fourth of his creditors in number, and one-third in value, as there stated, that he was entitled to a discharge irrespective of the time when the debts were incurred; and, therefore, I hold, contrary to the opinion of the District Court, that the 9th Section of the Act of June 22, 1874, necessarily repealed the proviso to the 5112th Section of the Revised Statutes, and that in this case, on the facts as conceded, the bankrupts are entitled to their discharge, and it will be so ordered and certified to the District Court.

Perhaps I should add that in considering this question, I have fully examined the various cases which have been cited by the counsel of the respective parties.

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## SUPREME COURT—PENNSYLVANIA.

JANUARY 6, 1879.

Chattel mortgages are not sanctioned in Pennsylvania.

Where delivery of exclusive possession of goods accompanies an absolute or conditional sale, a reservation of lien or right of property in the vendor will not protect them from the vendee's creditors.

The bankrupt sold its saw-mill, to one D., and agreed to furnish stock for said mill at a specified rate per thousand feet, the logs and timber to be held as property of the vendor until manufactured into lumber and divided; the lumber to be divided in two equal parts, one of which was to be the property of the vendor, and was to be credited to vendee at its market value, and applied to the indebtedness due the vendor. D. formed a co-partnership under the name of D. & Co., which became vested with D.'s interest in the contract. The sheriff, under an execution against D. & Co., seized and sold logs in the boom and creek which had been taken from the bankrupt's lands under the contract and lumber at the mill which was the product of similar logs, but which had not been divided. In an action brought by the assignee in bankruptcy against the sheriff and execution creditor to recover the value of the property, the plaintiff was nonsuited, *Held*, No error.

*A. H. EUWER, Assignee, &c., of the Superior Lumber Co.*, v. *T. J. VAN GIESSEN et al.*

THIS was an action of trespass *vi et armis de bonis asportatis*, brought by A. H. Euwer, assignee in bankruptcy of the Superior Lumber Company, against T. J. Van Giessen, late

sheriff of Forest County, and James Campbell, N. Myers, Charles Leeper, C. A. Rankin, and James B. Knox, doing business as the Discount and Deposit Bank, of Clarion, to recover the value of certain logs and sawed lumber, seized and taken in execution by the defendants as the property of George W. Dithridge & Co., under the following circumstances:

In August, 1872, the Superior Land Company, a corporation chartered under the laws of Pennsylvania, owning timber lands in Forest County, on Tionesta Creek, entered into a written contract with George W. Dithridge, by which they agreed to sell him their saw-mill, machinery, and fixtures for ten thousand dollars, blacksmith shop and contents for one hundred and fifty dollars, and other goods at fair prices, the store goods to be delivered on orders as the work of manufacturing lumber should progress, the purchaser to have the right to remove the mill to the mouth of Tionesta Creek, on his own land. The vendor agreed to furnish stock for said mill upon a specified basis of charges per thousand feet of pine, hemlock, or other timber. The logs and timber removed by the vendee from the lands of the vendor were to be held as the property of the vendor until manufactured into lumber and divided. The indebtedness accruing by the contract, or in any other manner, from the vendee to the vendor, to be thus liquidated: the lumber manufactured from said logs to be piled daily in two equal parts, the one-half to be the property of the vendor, and the other of the vendee; the portion of the vendor to be credited at its market value to the vendee, and applied, first, to the amount due the vendor for stumpage, and the balance, if any, on account of indebtedness for mill, store goods, etc. When there should be no other indebtedness, except for stumpage, the vendee to turn over to the vendor so much lumber as, at market price, will liquidate the same. The vendee to give a judgment bond for twenty-five thousand dollars to the vendor for indebtedness accruing or to accrue upon the contract, secured by mortgage upon the site where the mill is to be erected.

Soon after this contract was executed, George W. Dith-

ridge moved the mill down to the mouth of Tionesta Creek, and began the manufacture of the Superior Company's timber under the terms of the contract.

On December 31, 1873, George W. Dithridge entered into partnership with Henry H. Collins, under the firm name of George W. Dithridge & Co. By the terms of their articles of copartnership, the interest of George W. Dithridge in the contract with the Superior Lumber Company became vested in the firm of George W. Dithridge & Co., who continued the manufacture of the Superior Lumber Company's timber under said contract.

On January 3, 1876, the Discount and Deposit Bank, of Clarion, Pennsylvania, having obtained a judgment and execution against George W. Dithridge & Co., in Forest County, caused the sheriff of Forest County to sell a large quantity of lumber and logs as the property of George W. Dithridge & Co., part of which had been taken by them from the lands of the Superior Lumber Company under the terms of the contract with George W. Dithridge, dated August 19, 1872, the larger quantity being logs in the boom and creek, and the sawed lumber at the mill being not yet divided. The Superior Lumber Company, at and before the sale, gave notice to the sheriff and defendants that George W. Dithridge & Co. did not own the lumber and logs sold, but that they belonged to the Superior Lumber Company.

It was averred by the Land Company that pine and hemlock boards and logs, worth about fourteen thousand dollars, belonging to them, were sold, for which they received no compensation. A. H. Euwer, assignee in bankruptcy, was substituted as plaintiff after suit brought and before trial. The foregoing facts having been given in evidence on behalf of plaintiff, defendant's counsel moved for a nonsuit, alleging that the contract dated August 19, 1872, between George W. Dithridge and Superior Lumber Company was a conditional sale, and that the title to the logs and lumber sold was, under the terms in the contract, the property of George W. Dithridge & Co. as to execution creditors.

The nonsuit was granted as asked, with leave to move the court in banc to take it off, which motion was, after argument, refused.

*E. L. Davis* and *William A. Stone*, for plaintiff in error.

*B. J. Reid & Son* and *Miles W. Tate*, for defendants in error.

TRUNKEY, J.—In Pennsylvania, chattel mortgages are not sanctioned. The common law rule prevails that one man shall not have a lien on personal property owned by and in possession of another, as against creditors and innocent purchasers. Various devices to defeat the rule, though valid between the parties thereto, have failed. Numerous decisions have settled that where delivery of exclusive possession of goods accompanies an absolute or conditional sale, a reservation of lien or right of property in the vendor will not protect them from the vendee's creditors. Delivery of goods upon bailment for a proper purpose is another thing. The contracts in *King* v. *Humphries* (10 Barr, 217), and *Becker* v. *Smith* (9 P. F. Smith, 469), were clear cases of bailment, and easily distinguished from such as in *Martin* v. *Mathiot* (14 S. & R. 214), and *Mitchel* v. *Com.* (1 Wright, 187). Nor is *Ross* v. *Story* (1 Barr, 190), an exceptional case, unless in its facts. There the pivot was retained in possession by the vendor, and that fact secured his lien or right of property according to the terms of his contract; otherwise he would have been within the principle stated by Rodgers, J.: "If the vendor and vendee agree that the possession shall pass to the vendee, but the property remain in the vendor until the purchase money is paid, such agreement, as respects creditors and the sheriff, is fraudulent. By transferring the possession to the vendee under such a contract, a false credit is given to the vendee, and therefore in respect of third persons, as he is the apparent, so he is to be considered the real owner."

By the agreement dated August 19, 1872, did the Superior Lumber Company sell the logs and standing timber to Dith-

ridge? Sale was made of the saw-mill, machinery, and fixtures for ten thousand dollars, blacksmith shop and contents for one hundred and fifty dollars, and provision for sale of other goods at fair prices; the store goods to be delivered on orders as the work of manufacturing lumber should progress. The purchaser had the right to remove the mill to the mouth of the Tionesta, on his own land. The vendor agreed to furnish stock for said mill, as follows, namely, for all pine logs then on hand, seven dollars and fifty cents; for all hemlock logs, four dollars; and for standing timber, pine, five dollars and fifty cents, and hemlock, two dollars, for every thousand feet of lumber sawed therefrom. The logs and timber removed by the vendee from the land of the vendor were to be held as the property of the vendor until manufactured into lumber and divided. The indebtedness accruing by the contract, or in any other manner from the vendee to the vendor, shall be thus liquidated; the lumber manufactured from said logs shall be piled daily in two equal parts, the one-half to be the property of the vendor, and the other of the vendee. The portion of the vendor shall be credited at its market value to the vendee, and applied first to amount due the vendor for stumpage, and the balance, if any, on account of indebtedness for mill, store goods, &c. When there shall be no other indebtedness, except for stumpage, the vendee shall turn over to the vendors so much lumber as, at market price, will liquidate the same. The vendee to give a judgment bond for twenty-five thousand dollars to the vendor for indebtedness accruing or to accrue upon the contract, secured by mortgage upon the site where the mill is to be erected.

No dissection is necessary to discover the nature of this agreement. The logs and timber were sold at certain rates to be paid from time to time, in lumber, at market prices, in like manner as other indebtedness of the vendee to the vendor, merely giving preference in order to the account for stumpage. Indebtedness for mill, goods, and stumpage were alike secured by judgment and mortgage. Whatever the fluctuations in the prices of lumber, the vendor of the standing timber lost or

made nothing. Its price was fixed. If the value of half the lumber would not pay the price, the vendee would owe the difference. Nothing in this agreement authorizes an inference that the one party furnished stock to be manufactured by the other in consideration of a proportionate part of the manufactured article, nor in consideration of the difference between a set price for the stock and of the product.

The evidence was, that the logs seized were in possession of the execution debtor, and taken in part from the plaintiff's land and part from other lands, and that the lumber seized was the product of the logs taken in like manner; that said logs and lumber were mixed, and that there had been no division or setting apart of any portion for the plaintiff.

The learned judge was clearly right in ordering nonsuit.

Judgment affirmed.

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## UNITED STATES DISTRICT COURT—NEW JERSEY.

JULY 25, 1879.

A merchant miller, who purchases grain, grinds it into flour and feed, and retails the manufactured articles from a store, is a tradesman within the meaning of Section 5110.

The bankrupt kept no cash-book. He had an account with "merchandise" in his ledger, showing in one column his aggregate monthly payments for grain, and in another an aggregate monthly amount of sales. His books did not show what moneys were expended in carrying on the business nor what sums were taken out for household and family expenses. *Held*, That the books did not answer the requirements of the law.

### *In re ANKETELL.*

SPECIFICATIONS against discharge.

*C. T. Glen*, for opposing creditor.
*Jos. Coult*, for the bankrupt.

NIXON, J.—The opposing creditors have filed fourteen specifications against the discharge of the bankrupt, several of which, if sustained, very seriously affect his moral character.

It is not my intention to examine them *seriatim*, but it is due to the bankrupt to state that I have read the voluminous testimony with care, and whilst it is clear that he has done and said many things that cannot be approved, I am not convinced by the evidence that they have been done or said with a fraudulent intent. Section 5110 of the Revised Statutes enumerates the various grounds for which, under the Bankrupt Act, the court will refuse a discharge. It states under the 7th sub-division that no discharge shall be granted, or if granted shall be valid, "if the bankrupt, being a merchant or tradesman, has not at all times, after March 2, 1867, kept proper books of account."

The fourteenth specification against the discharge alleges, in substance, that proper books of account have not been kept in the present case.

This is a question of fact, not one of fraudulent intent, and each case must be largely determined by its circumstances; what might be deemed proper books of account in one business, might be fairly considered fatally defective in another.

It is reckoned an important provision of the law, having in view a three-fold object: (1) to enable the debtor himself to ascertain at any time, by an examination of his financial creditors; (2) to have such a complete record of all his business transactions, that his creditors upon his call may be able to determine his ability to meet his engagements and undertakings; and (3) in case of bankruptcy, to assist the assignee in the administration of the estate, enabling him to trace out the dealings of the debtor, the causes of his failure and the honesty of his acts.

The business of the bankrupt brings him within the definition of a tradesman. He was a merchant miller, purchasing grain and grinding it into flour and feed and retailing the manufactured articles from a store. The amount of his business averaged about sixty thousand dollars a year, running through several years.

His book-keeping was peculiar and to the last degree unsatisfactory. He kept no cash-book or statement of cash re-

ceipts and disbursements. He had in his ledger an account with "merchandise," showing in one column his aggregate monthly payments for grain, and in another an aggregate monthly account of his sales. The difference between these columns he called profits. But his books do not show what moneys were expended by him in carrying on the business, nor what sums were taken out for his household and family expenses. It is quite clear that they did not reveal to him—and much less to others—the actual condition of his affairs; that he had no idea of his insolvency until about the time that he stopped payment, although he was not then able to pay to his creditors more than ten cents on the dollar.

Books thus kept do not answer the requirements of the law. A cash-book, although important in exhibiting the nature and character of the receipts and disbursements of the business, is not indispensable, provided a cash account appears in the books, showing all the transactions.

Judge Blatchford recently held in *Re Hannahs* (8 Ben., 477), that in the absence of a cash-book, it must be clearly shown by the bankrupt that the entries, which would there appear, appear elsewhere in his books as entries of cash, and that the state of his cash receipts and payments can be ascertained by the books he did keep.

The bankrupt's books fail to supply the deficiency here, and without looking at any other specifications or expressing any opinion in regard to them, the discharge must be refused.

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## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

APRIL 28, 1879.

**The bankrupt resided in this State, but did business in New Jersey. On the 27th of July, 1878, a creditor's petition was filed in the district of New Jersey. The proceedings were contested, references had, and much testimony taken, and on or about March 1, 1879, an order of adjudication was entered. On August 31, 1878, the day the Bankrupt Law expired, a creditor's petition was also filed in this district, and an order to show**

cause issued returnable October 5, 1878. This order was not served, and on the 5th of Feb., 1879, a new order was issued returnable Feb. 15, 1879. On the return day of the latter order an order of adjudication was entered by consent. It appeared that the case was not put upon the calendar for Feb. 15, 1879, and that the attorney for creditors in the New Jersey case was thereby prevented from appearing to oppose an adjudication. On the 4th of March, 1879, the bankrupt procured an order staying all proceedings in the New Jersey case. *Held*, that the provisions of General Order No. 16 did not apply; and that, under the circumstances, the adjudication in this case should be set aside and all proceedings stayed pending the proceedings in the district of New Jersey.

*In re DANIEL G. BROWN.*

The facts appear fully in the opinion.

*W. B. Putney*, for petitioners.
*I. N. Wilcoxsen*, for bankrupt and others.

CHOATE, J.—This is a petition of several creditors of the bankrupt, to set aside the adjudication and stay the proceedings on the creditor's petition therefor, on the ground that prior to the filing of the creditor's petition in this court a petition was filed in the district of New Jersey, which had proceeded to a hearing, and that the order of adjudication entered in this court was entered by the bankrupt and the petitioning creditors with intent to defeat the proceedings of those creditors who were petitioning creditors in the New Jersey case, and that the order of adjudication in this court was entered irregularly or in so unusual a manner that these petitioners had in fact no opportunity to appear and suggest to the court the pendency of the case in New Jersey as a ground for staying the proceedings in this court.

The facts, which are not disputed, are that the bankrupt resided at Newburg in this district, and did business in the district of New Jersey; that on the 27th of July, 1878, a creditor's petition was filed in the district of New Jersey; that an order to show cause issued thereon, which was returnable on or about August 19, 1878; that the alleged bankrupt was served therewith and appeared in said proceeding, and resisted the adjudication, and thereupon said court proceeded to hear and

determine the cause. Questions of fact in respect to the rights of the petitioning creditors to maintain said proceedings as creditors, and in respect to the truth of the alleged acts of bankruptcy, arose in the course of said hearing, on which references were had and much testimony was taken; and on or about March 1, 1879, the matter having been brought on for a hearing before said court, a decision was made in favor of the petitioning creditors, and the bankrupt was adjudicated on the 4th of March, 1879; and after all these proceedings, and the order of adjudication, on the suggestion of the bankrupt that a prior adjudication had been made in this district, all further proceedings were stayed until the petitioning creditors in that proceeding had an opportunity to move this court to set aside its order of adjudication.

The facts in relation to the proceedings in this court are as follows: August 31, 1878, the day the Bankrupt Law expired, certain other creditors or alleged creditors of the bankrupt filed a petition against him in this district. An order to show cause was issued thereon returnable October 5, 1878, but at the return day no service having been made, there was no appearance for the bankrupt. On the 5th of February, 1879, an alias order to show cause was issued returnable on the 15th of February. This was not served until February 13, 1879. The petitioning creditors neglected to put the case on the calendar, and it never appeared in the calendar of this court after October 5, 1878. But on the return day the petitioning creditors and the bankrupt appeared, and the bankrupt then subscribed and swore to an admission of service of the order to show cause on him on the 8th of February, and no one appearing to object, and the bankrupt consenting, the order of adjudication was entered. At that time the proceedings in New Jersey were very nearly approaching a final determination on the question of adjudication, as the petitioning creditors in the proceeding in this court and the bankrupt well knew. The attorney of the petitioning creditors in the New Jersey case learned of the filing of the petition in this district, and was prepared to intervene in their behalf on the return day of the

original order to show cause, and move a stay of proceedings on account of the pendency of the proceedings in New Jersey; and no action being taken under that order to show cause, he kept watch on the calendar of this court, relying on the usual order of proceeding in that class of cases, in accordance with which they are put on a calendar made up by the clerk before they are called on the return day. In consequence of the case not going upon the calendar, he had no knowledge of the order of adjudication till after it was entered, and he now moves, on behalf of his clients, the petitioning creditors in the New Jersey case, to vacate the order and to stay the proceedings pending the case in New Jersey.

The stay of proceedings granted on the application of the bankrupt in the New Jersey case, and which will, if maintained, render nugatory all the proceedings and the long and expensive trial had therein, and also deprive these petitioners of any benefit of their earlier petition in that district, provided this court goes on to administer the estate, is in accordance with General Order No. 16, which provides that "the court which first makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed."

These petitioners, therefore, had a clear right to intervene and procure a stay of adjudication here, if entitled on the facts to such a stay, because they had a special interest which would be affected and impaired by an adjudication. If they had appeared on the return of the order to show cause, they would have been heard to object to the adjudication. It is equally clear that upon their suggestion of the facts now appearing and not disputed, a stay would have been granted pending the determination of the hearing before the District Court of New Jersey. Independently of any rules specially regulating these proceedings, it would have been unseemly and improper for this court to proceed in the case till such determination; the court in New Jersey having undoubted jurisdiction, and having proceeded with the concurrence of all the parties to this proceeding to hear and determine the cause, the result of which

might be and was intended by the moving parties to be the sequestration of the estate of the bankrupt for the benefit of his creditors, under the supervision and direction of that court.

The 16th General Order provides that "in case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be in the district in which the debtor has his domicile, and such petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the earlier petitions." In this case a hearing was had in the New Jersey case before the petition in this district was filed. And this General Order does not admit of a construction which would permit the parties to this proceeding, after suffering the case in New Jersey to go on without objection for many months, now to insist that the proceeding in this court shall take precedence of that. It appears that the petition in this district was filed with the concurrence of the bankrupt, and that for some reason, while violently opposing an adjudication there, he was quite willing to have one here. If he had claimed his privilege in time under this petition, or had filed a voluntary petition in this district as soon as he knew of the petition in New Jersey, he might claim the benefit of the General Order giving him a preference to be adjudicated in the district where he was domiciled. But it may be doubted whether General Order No. 16 would or could apply where any substantial injustice would be done to the petitioning creditors in the earlier petition by reason of the petition by or against the bankrupt in the district of his domicile being later in time. In the present case the District Court of New Jersey has actually had in its custody for many months the bankrupt's estate, seized under a provisional warrant. The virtual abandonment of that proceeding, and the prevention of this one would involve the parties in great loss and expense, and the rehearing of questions there raised and litigated. I have no hesitation in holding that the proceedings in this case should have been stayed, and that the case in New Jersey

should be allowed to proceed unembarrassed by the order of adjudication of this court.

It is said, however, that the motion of the petitioning creditors in the proceeding here was entirely proper, that they doubted whether the proceedings in New Jersey could be sustained; that they believed, and now believe, that that proceeding will be finally dismissed upon a review of the order of the district judge in the Circuit Court, assuming that the motive for filing the creditors' petition here was, as stated, to secure the adjudication of bankruptcy of their debtor, even if the proceedings in New Jersey were finally decided in the bankrupt's favor—which motive I find no occasion to question; yet while that motive fully justifies the filing of the petition, it does not at all affect the question whether proceedings in this case should be stayed, especially after the petitioning creditors have apparently, by their inaction in this case, proceeded on the theory that the case here was to be kept in reserve till the case in New Jersey should fail. The setting aside of the adjudication will not imperil or affect any proper use that the petitioning creditors intended to make of this proceeding against the alleged bankrupt. If, on review, the decision of the district judge shall be reversed, and the original petition in that court shall be dismissed, they will be then free to go on with this case. Meanwhile this court cannot but assume that the decision of the District Court of New Jersey is correct.

Regarding this as an application to open a default and let the petitioners in to oppose the adjudication on grounds which, if they had appeared on the return day, they would have been entitled to urge, the petitioners are in no fault for not appearing. While the proceedings upon the return day are not irregular, these petitioners used due diligence of the accustomed mode of proceeding; there was no laches or negligence on their part. The course of the petitioning creditors and the bankrupt was such as to throw them off their guard, and deprive them of their opportunity to be heard. Whether this was intentional or unintentional is immaterial, and the petitioners are clearly entitled to come in and have the default

opened, and to stand in the same position as if they had appeared on the return day. Since the adjudication in this court nothing further has been done in the cause, and no party will be injured by opening the decree, and the application has certainly been made with all proper diligence.

Motion granted vacating adjudication, and staying all proceedings pending the proceedings in the District Court of New Jersey.

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UNITED STATES DISTRICT COURT—IOWA.

AUGUST, 1879.

**Funds in the hands of an assignee in bankruptcy cannot be reached by process of garnishment.**

## *In re CUNNINGHAM.*

THE facts appear fully in the opinion.

*Gilmore & Anderson* and *Joseph G. Anderson*, for Alexander.

*James & Frank Hagerman*, for intervenor.

LOVE, J.—The case before the court is this: On the —— day of ——, 1876, Cunningham & Mason were by this court adjudged bankrupts, and Harry Fulton chosen assignee. This court, in bankruptcy, on the 22d day of September, 1877, declared a dividend of said estate, and ordered the assignee to pay the same to the creditors. Among the creditors were Matthews & Co., to whom the court adjudged a dividend of four hundred and eighty-eight dollars and thirty-eight cents. Subsequent to the order declaring the dividend, and directing the assignee to pay the same—but before the assignee made the payment—that is to say, on the 29th day of September, 1877, Miller Alexander, to whom Matthews & Co. were indebted by note, commenced a suit in the Circuit Court of Lee County, Iowa, and

garnisheed Harry Fulton, the assignee, seeking to obtain satisfaction out of the dividend in his hands which had been adjudged to Matthews & Co. Miller Alexander transferred his right of action to Fontaine Alexander, who was duly substituted as plaintiff in the State Court, and who, in due course, obtained judgment against Matthews & Co. in the State Circuit Court for the full amount of his claim, and against Harry Fulton, as garnishee, for said sum of four hundred and eighty-eight dollars and thirty-eight cents. The judgment against the garnishee, Fulton, was somewhat peculiar. It provided that no execution should issue until the District Court of the United States for the district of Iowa should order said Harry Fulton, assignee, to pay said sum to plaintiff. On the 16th day of January, 1878, Miller Alexander presented his petition to this court, praying that Harry Fulton be ordered to pay the sum due from him to said Matthews & Co. to the sheriff of Lee County to abide the judgment of the State Court.

It further appears that, on the 28th day of April, 1879, said Matthews & Co., for a valuable consideration, transferred and assigned to one Elbert G. Roberts, who intervenes in the case, the said dividend, amounting to said sum of four hundred and eighty-eight dollars and thirty-eight cents, authorizing him to collect the same, etc. Harry Fulton also intervenes, answering petitions of plaintiff and said Roberts, asking to be protected.

It is well settled that money or property in *custodia legis* cannot be reached by garnishment or execution in the absence of statutory authority. This doctrine has been applied in numerous cases; to various classes of legal custodians, such as receivers, sheriffs, clerks of court, executors and administrators, treasurers, assignees in bankruptcy, etc. (*Patterson* v. *Pratt*, 19 Ia., 358; Drake on Attachments, 5th ed., ch. 22, 493 to 516.) Property in hands of a receiver is in *custodia legis*, and is exempt from execution or attachment. (*Watson* v. *Davis*, 21 Ia., 539; *Wiswall* v. *Sampson*, 14 How., 52; *Columbian Book Co.* v. *DeGolyer*, 115 Mass., 69; *Glenn* v. *Gill*, 2 Md., 1; *Taylor* v. *Gillean*, 23 Tex., 508; *Field* v. *Jones*, 11 Ga., 413; *Nelson* v. *Connor*, 6 Rob. (La.), 339; *Langdon* v. *Lockett*,

6 Ala., 727; *Farmers' Bank* v. *Beaston*, 7 Gill. & John., 421; *Gouverneur* v. *Warner*, 2 Sandf., 624; *Co. of Yuba* v. *Adams & Co.*, 7 Cal., 35; *Bentley* v. *Shrieve*, 4 Md. Chy. Dec., 412; Freeman on Executions, 129; Drake on Attachment, 509; *Robinson* v. *A. & G. Ry. Co.*, 66 Pa. St., 160.) Same rule applies to garnishment. (*Glenn* v. *Gill*, 2 Md., 1; *Taylor* v. *Gillean*, 23 Tex., 508; *Columbian Book Co.* v. *DeGolyer*, 115 Mass., 69; High on Receivers, 151.) Applied to trustee appointed by the court. (*Bentley* v. *Shrieve*, 4 Md. Chy., 412. See *Jones* v. *Gorham*, 2 Mass., 375; *DeCoster* v. *Livermore*, 4 Mass., 101, in which assignees, under the Bankrupt Law of 1800, were charged. But the question was not raised nor considered, and the cases were afterwards overruled in *Colby* v. *Coates*, 6 Cush., 558.)

The rule was applied to sheriffs (*Wilder* v. *Bailey*, 3 Mass., 289); to county treasurers (*Chealy* v. *Brewer*, 7 Mass., 259); to executors and administrators (*Brooks* v. *Cook*, 8 Mass., 246). *Colby* v. *Coates* (6 Cush., 558), decided that an assignee, under the Insolvent Law of Massachusetts, cannot be reached by trustee process. (Approved and followed in *Columbian Book Co.* v. *DeGolyer*, 115 Mass., 69; *Dewing* v. *Wentworth*, 11 Cush.,.499.) Assignees in bankruptcy cannot be charged as garnishees in State Courts. (*In re* Bridgman, 2 N. B. R., 522; *Jackson* v. *Miller*, 9 N. B. R., 252.) The remedy to reach this fund is to have a receiver appointed to represent this fund in Bankrupt Court (*Jackson* v. *Miller*, 9 N. B. R., 143); or by creditors' bill before judgment (*Pendleton* v. *Perkins*, 49 Mo., 565; *Thompson* v. *Scott*, 4 Dillon, 508). The State Court has no authority to bring an assignee before it who is acting under the orders of the United States Court. (*Akins* v. *Stradley*, 1 N. W. Rep. (N. S.), 609.)

The reason of this doctrine seems to be that the court, having the money or property in its custody under the law, holds it for some purpose, of which that court is exclusive judge. To permit property or money thus held, to be seized on execution, attached or garnisheed, would, therefore, defeat the very purpose for which it is held, and, in many cases, enable some other

court to dispose of the property or money, and wholly divest it from the end or purpose for which possession has been taken. A conflict of jurisdiction and decision would, in many cases, thus ensue. Thus, the court in possession of the property or money might order it to be distributed or paid in a certain way, while the court issuing the process of garnishment might order and adjudge a wholly different destination of the property or money. To attempt a seizure of property by attachment in some other court would necessarily bring the two tribunals into collision, and would, if successful, wholly withdraw the property from the power of the court in possession, and divert it from the purpose for which possession has been taken.

The true doctrine is that, when property or money is in *custodia legis*, the officer holding it is the mere hand of the court; his possession is the possession of the court; to interfere with his possession is to invade the jurisdiction of the court itself, and an officer so situated is bound by the orders and judgments of the court whose mere agent he is, and he can make no disposition of it without the consent of his own court, express or implied. How can such an officer, when garnisheed, know what answer he can make with safety to himself, in advance of the orders and judgments of the court having possession of the property and jurisdiction of his person? How could such an officer safely expose himself by his answer as garnishee to the danger of a personal judgment in some other court, before the determinations of the court having control of him and the property? Suppose the court, whose hand and agent he is, should order and direct him, in a given case, to make one disposition of the property or money, and the court issuing the process of garnishment should enter judgment against him, requiring a wholly different disposition of it, which judgment should he obey? He would be like a soldier between two fires, and he would inevitably fall under one or the other. But by far the deadlier fire of the two would be that of his own court, since he would not only, by a disobedience of its orders, expose himself to a suit upon his official bond, but to punishment for contempt.

In this view of the subject, it has been held in some cases that, when the court having charge of the property, money, or funds, makes final orders for its distribution, the officer whose duty it is simply to turn over to each individual distributee the amount awarded to him by the final judgment of the court, may be garnished by a creditor of a party to whom the dividend or distributive share has been adjudged. Thus, in New Hampshire, Delaware, and Missouri, while the principle announced in Massachusetts was recognized as sound, it was considered to be inapplicable when an administrator had been, by the proper tribunal, adjudged and ordered to pay a certain sum to a creditor of the estate, and in such case the administrator was charged as trustee of the party to whom the money was ordered to be paid. (*Adams* v. *Barrett*, 2 N. H., 374; *Fitchett* v. *Dolbee*, 3 Harr. (Del.), 267; *Curling* v. *Hyde*, 10 Mo., 374; *Richards* v. *Griggs*, 16 Mo., 416.)

The reason of this exception was given by the Superior Court of New Hampshire and adopted by the Supreme Court of Missouri in the following language: "An administrator, till he is personally liable to an action in consequence of his private promise—the settlement of the estate, or some decree against him, or other cause—cannot be liable to a trustee process. Because till some such event, the principal has no ground of action against him in his private capacity, and he is bound to account otherwise for the funds in his hands. The suit against him till such an event, is against him in his representative capacity, and the execution must issue to be levied *de bonis testatoris* and not *de bonis propriis*. But in the present case, the trustee was liable in his private capacity to the defendant for the dividend. The debt has been liquidated, and the decree of payment passed. The debt was also due immediately. Execution for it ran against his own goods, and the trustee process would introduce neither delay nor embarrassment in the final settlement of the estate." The doctrine of this case is that where the court having custody of the money, fund, or property, and jurisdiction of the subject-matter, makes a final determination of the matter, and awards

judgment as to the amount to be paid to each individual distributee, the officer thus required to make payment may be made personally liable for his failure to make the payment, and therefore a garnishment against him, resulting in a personal judgment, is no invasion of the jurisdiction of the court having the property in custody, and no encroachment upon the possession of that court. On the contrary, the garnishment recognizes the action of the court ordering the payment or distribution, and founds itself upon the judgment of that court. When the judgment in the garnishment proceeding must needs be against the garnishee in his representative capacity, the proceeding must fail, because it could be levied neither upon the garnishee's private property nor upon the property he represents; not upon the former, because the judgment is not personal, nor upon the latter, because the property which he represents is in the possession and under the control of another court, whose possession and jurisdiction cannot be invaded.

It might be supposed, upon a hasty glance, that the principle laid down in the New Hampshire, Delaware, and Missouri cases is applicable to the case now before the court. Here the court of bankruptcy has declared a dividend, and determined specifically what each creditor is entitled to. It has ordered the assignee to pay a specific sum to the judgment debtor in the State Court from which the process of garnishment issued. If the assignee failed to pay that sum, he would be liable to a personal action; why, therefore, may he not be garnished? Why may not a personal judgment be rendered against him, as garnishee, for the amount of the dividend, since a personal action could be maintained by the judgment creditor against him for the same cause?

There is, in my judgment, an insuperable difficulty in recognizing this view in the present case, growing out of the peculiar jurisdiction in bankruptcy. It cannot for a moment be doubted that the court of bankruptcy has exclusive jurisdiction of the bankrupt's estate, and of its administration from the time of the adjudication to the final discharge of the estate, and the

discharge of the assignee. This jurisdiction does not, by any means, cease with the order of distribution. It is clearly within the power of the court, and its duty to see that its assignee pays over to the distributees the dividends awarded to them. The assignee failing to perform this duty, the court would punish him for contempt—order a suit upon his official bond, and refuse to give him a final discharge. This jurisdiction is exclusive. No other court can touch, or bind the assets of the bankrupt, or authorize any suit against the assignee, who is the officer of the court. It follows that any action in any other tribunal, aiming to control the action of the assignee, or directly or indirectly compel the assignee to dispose of the assets or pay over money in his hands belonging to the estate, must be utterly without jurisdiction, and therefore null and void. What is the effect of a garnishment of the assignee? It either compels him to suspend payment to the distributee in bankruptcy, in pursuance of the order and judgment of the Bankrupt Court, or it is without any legal efficacy whatever. The nature of every garnishment is that the garnishee must, upon receiving the notice, keep the property, money, or debts in *statu quo*, to await the final judgment of the court issuing the process. The notice of garnishment to the assignee in this case had that effect, or it was wholly nugatory. But how could the State Court, without any jurisdiction whatever, issue any process to arrest the action of the assignee in the payment of dividends ordered by the court of bankruptcy? How could a court, manifestly without jurisdiction, thus by its process and judgment affect the administration of and final distribution of the bankrupt's estate? To sum up the argument, the Court of Bankruptcy, having exclusive jurisdiction, orders its assignee to distribute the estate to the creditors, in dividends declared by the court; but a State Court, without any jurisdiction whatever, sends its process to the assignee, commanding him, in substance, not to pay over the dividends, but to await the final judgment of the State Court! Which of these commands shall the assignee obey? And if this could be done, it might result in postponing, almost indefinitely, the final settlement of

bankrupts' estates; for there might be numberless suits against the creditors in bankruptcy, and, of course, there could be no final settlement and distribution until the final action and judgment in the State Courts in the principal actions. Hence the proceedings in bankruptcy would have to be stayed, to await the slow and tedious course of justice, which might prove to be long protracted litigation in the State Courts.

It was argued that this court, seeing the justice of the petitioner's claim as a creditor, would, by a sort of comity, recognize the judgment of the State Court, and order the assignee to pay the dividend upon it. Comity is a vague and undefined principle in our jurisprudence. I do not know of any law or usage which would justify the court in making such an order. If the question were between the original parties, there would be less difficulty; but other rights have intervened. The dividend has been assigned, and the assignee is before the court claiming under his assignment. Seeing that the garnishment was without jurisdiction, and therefore absolutely null, there was no lien, and nothing pending in the nature of a judicial proceeding of which the assignee of the dividend was bound to take notice. I cannot, therefore, see but that he had a perfect right to purchase the dividend, and take a transfer of it. And if he did, and paid his money for it, his equity is at least equal to that of the attaching creditor. There is, therefore, no overruling consideration of equity to induce the court to resort to some extraordinary remedy unknown to the law, to aid the attaching creditor as against the assignee of the dividend.

The fund should be paid to Roberts, the intervenor.

## UNITED STATES DISTRICT COURT—NEW JERSEY.

**The claimant, who had for several years held a chattel mortgage executed by the bankrupts, took possession under the mortgage upon learning of their insolvency, and, within four months of the filing of the petition in bankruptcy, sold the property and became the purchaser at the sale. The assignee in bankruptcy brought suit against him and recovered judgment for the value of the property, the jury finding that the claimant was**

guilty of actual fraud in obtaining and holding the preference. The judgment having been paid, the claimant proved his claim in full. On motion to expunge, *Held*, That claimant could not prove his whole claim, but could prove a moiety thereof.

## *In re KAUFMAN & HOUCK.*

THE facts appear fully in the opinion.

*Q. Keasbey*, for the assignee.
*T. N. McCarter*, for the creditor.

NIXON J.—This proceeding is on a rule to show cause why the claim of David Jones, against the estate of the bankrupts, should not be disallowed in whole or in part. The claim was proved and filed on the first day of February, 1879, for thirty thousand nine hundred and thirty-five dollars and sixty-eight cents, the price of certain goods, wares and merchandise sold and delivered by the claimant to the bankrupts at various times from the 8th day of October, 1873, to the 27th day of June, 1874, with the interest which had accrued thereon to the 12th day of December, 1874, when the petition in bankruptcy was filed.

No question is raised that the money is not due, but the assignee insists that the claim should be expunged upon the ground that the creditor had forfeited his right to prove the debt against the estate, by reason of his attempt to maintain the validity of a chattel mortgage, which he endeavored to hold as security for the claim.

The mortgage was executed by the bankrupts to the claimant in the month of December, 1871, at a time when their indebtedness amounted to about fourteen thousand dollars, and was given to secure that debt, as well as all future advances to the sum of fifteen thousand dollars, and covered certain enumerated personal property then in their possession and all after-acquired property. The mortgagee took possession under the mortgage in August, 1874, upon learning of the insolvency of the mortgagors; made sale of all the personal estate; became the purchaser at the sale; and while he was converting the

same to his own use and before the expiration of four months, other creditors filed a petition of bankruptcy against the debtors and procured an adjudication and the appointment of an assignee, who, after demand and refusal to surrender, brought suit against the mortgagee and recovered a judgment for the value of the property, as having been conveyed in fraud of the provisions of the Bankrupt Act. The judgment has been paid in full, and the creditor now claims the right to prove his whole debt against the bankrupt's estate. Whether he is allowed to do so depends upon the proper construction of the 12th Section of the Act of June 22, 1874, amending Section 5021 of the Bankrupt Law. That amendment provides that where a preference has been given by payment, assignment, or transfer, and the debtor shall afterward be adjudged a bankrupt, the assignee may recover back the money or property so paid, assigned, or transferred, contrary to the act, provided that the person receiving such payment or conveyance had a reasonable cause to believe that the debtor was insolvent, and knew that a fraud on the act was intended; and such person, if a creditor, shall not in cases of actual fraud on his part, be allowed to prove for more than a moiety of his debt, and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy.

No difficulty would arise if this amendment stood alone. The section, before the change, expressly prohibited any proof by a creditor who knowingly received a preference. There was a widely expressed desire to relax the vigor of such a provision. It was deemed a hardship to punish men with the loss of their whole claim because they made an effort to secure the payment of their honest dues. This amendment was passed; and the only limitation that it seems to put upon the proof of debts is the loss of one-half of the claim, when actual fraud was proved against the creditor, and if there was no actual fraud in the transaction, if the preference was only constructively fraudulent, the implication is irresistible, from the language used, that he should be allowed to prove his whole debt. But in making this change, Congress evidently lost sight of the

provisions of § 5084 of the Revised Statutes, which deprive the creditor, who shall have accepted a preference, from either proving his debt or receiving a dividend, until he shall have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference. A creditor who holds on to a preference until he is compelled by due process of law to release his hold, cannot be said to have surrendered it. The term surrender, as used in the foregoing section, imports a voluntary act. The late learned Judge of the District Court for the Southern District of New York (Blatchford), in *Re* Stein (16 N. B. R., 569), reconsidered a former suggestion made by him in *Re* Riorden (14 N. B. R., 332), to the effect that the preference mentioned in § 12 of the amendment only applied where there had been a recovery, and held that there could be no surrender of a preference after a recovery by the assignee. Judge Nelson, of the District Court for Minnesota, in *Re* Cramer (13 N. B. R., 225), took the same view, and refused to allow certain creditors to prove at all, after a judgment had been entered against them establishing a fraudulent preference.

On the other hand, Judge Lowell, of the Massachusetts district, in *Re* Black (17 N. B. R., 399), dissents from this construction, and thinks the meaning of the statute, as amended, to be, that after a recovery of the damages and costs by the assignee the creditor may prove his debt, if he has not actively assisted in the fraud, and that where such active assistance appears, he may proof a moiety thereof; and this accords with the opinion of Judge Blodgett, of the Northern District of Illinois, in *Re* Newcomer (18 N. B. R., 85), where, after an assignee had recovered a judgment for a fraudulent preference, he refused to expunge the proof of debt which the creditor subsequently made in the bankruptcy proceedings, on the ground that the case did not disclose actual fraud.

I incline to the construction given by the last-named judges. The case is not without its difficulties in either aspect, but the latter, in my judgment, more nearly harmonizes with the legislative intention.

As the jury, on the trial, found that the claimant was guilty of actual fraud in obtaining and holding the preference, the rule to show cause must be made absolute and the proof for the whole debt expunged.

But the creditor will be allowed to prove for a moiety of his claim.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

FEBRUARY 6, 1879.

**A creditor who has not proved his debt cannot take part in composition proceedings, although he has been permitted to intervene in the proceedings upon the creditor's petition for adjudication and to act therein upon the reference.**

## *In re BRYCE & SMITH.*

THE facts appear fully in the opinion.

*W. H. Clark* and *Charles Tracy*, for motion.
*M. H. Regensberger* and *F. Mosher*, *contra.*

CHOATE, J.—This is a motion to vacate and set aside or to reopen the first meeting of creditors in composition, on the ground that the register refused to allow the petitioners, who were creditors, but did not prove their debts, to examine the bankrupts, and because the register refused to certify to the court the question thus raised by the petitioners. The case of *In re* Holmes and Lissberger (12 N. B. R., 86) established the rules in this district that no creditor could take part in composition proceedings unless he proved his debt. The case has been followed in this and other districts, and the question cannot any longer be considered an open one. There is, therefore, no error in the record. Nor is the case made one which appeals to the court for the reopening of the meeting as a matter of discharge. The petitioners declined to prove their claims, on the ground that such action might affect their rights to pro-

ceed for the recovery of their debts in case the composition shall be confirmed. It is not perceived that there is any basis for this position, since debts created by fraud, which the petitioners claim their debts to be, are equally bound by the composition with other debts. (*In re* Roger and Wardrobe, 18 N. B. R., 252.)

The desire of these petitioners to examine more fully than has been done into the affairs of the bankrupts can be fully gratified at the second meeting in composition, where the question will be presented to the creditors whether the composition is for the best interests of all concerned. This composition has been approved by all the creditors who appeared at the first meeting and proved their claims, and has been accepted by a majority in number and amount largely in excess of that required by the statute. Under such circumstances it would not be a proper exercise of discretion to reopen the first meeting upon the mere possibility that these petitioners might develop, by an examination, something which would induce some of the assenting creditors to change their votes; even if the petitioners have mistaken their rights in neglecting to qualify themselves to take part in the first meeting by proving their debts.

The fact that the petitioners have been allowed to intervene in the pending proceedings upon the creditor's petition for an adjudication, and to act therein upon the reference to the clerk as parties in interest, does not affect the question or operate to dispense with the customary proof of debts at the meeting in composition. They were so admitted to intervene, because upon their petition the court saw probable cause to suspect that there might be a purpose on the part of the bankrupt and the petitioning creditors to procure an adjudication by fraud and collusion in a case not within the terms of the statute. In such cases, although, as the law has been declared in this district, a creditor having no especial interest to protect, is not entitled as of right so to intervene, but as matter of discretion and to prevent an abuse of the process of the court, any person establishing by *prima facie* evidence that he is a creditor and

the papers made out a *prima facie* case against the bankrupt so as to warrant a reference to take the proofs.

Where a bankrupt procures a false and fraudulent petition to be filed by his creditors, with intent to procure a discharge which he could not obtain by voluntary proceedings, every movement he makes upon the basis of such petition is in contempt of court, and his proceedings to obtain a discharge will be perpetually stayed unless he shall comply with such reasonable terms for purging himself of the contempt as shall be imposed upon him.

The creditor who seeks to set aside the adjudication proved his debt in June, 1878. The petition alleged that the petitioner did not discover the alleged fraud and collusion before September 28th. The petition was filed December 9, 1878. *Held*, That there was no presumption, from his being a party to the proceedings, that he knew of the fraud before that time, and that the delay in filing the petition from September 28th to December 9th was not necessarily laches. 253

*In re* Wheeler & Riggs.

The 9th Section of the Act of June 22, 1874, necessarily repealed the proviso to Section 5112 of the Revised Statutes.

In any case of bankruptcy, where there are no assets equal to thirty per cent., if the bankrupt secures the assent of one-fourth of his creditors in number and one-third in value, he is entitled to a discharge irrespective of the time when the debts were incurred. 258

Enwer, assignee, v. Van Giessen et al.

Chattel mortgages are not sanctioned in Pennsylvania.

Where delivery of exclusive possession of goods accompanies an absolute or conditional sale, a reservation of lien or right of property in the vendor will not protect them from the vendee's creditors.

The bankrupt sold its saw-mill to one D., and agreed to furnish stock for said mill at a specified rate per thousand feet, the logs and timber to be held as property of the vendor until manufactured into lumber and divided; the lumber to be divided in two equal parts, one of which was to be the property of the vendor, and was to be credited to vendee at its market value, and applied to the indebtedness due the vendor. D. formed a copartnership under the name of D. & Co., which became vested with D.'s interest in the contract. The sheriff, under an execution against D. & Co., seized and sold logs in the boom and creek which had been taken from the bankrupt's lands under the contract and lumber at the mill which was the product of similar logs, but which had not been divided. In an action brought by the assignee in bankruptcy against the sheriff and execution creditor to recover the value of the property, the plaintiff was nonsuited. *Held*, No error. 263

*In re* Anketell.

A merchant miller, who purchases grain, grinds it into flour and feed, and retails the manufactured articles from a store, is a tradesman within the meaning of Section 5110.

The bankrupt kept no cash-book. He had an account with "merchandise" in his ledger, showing in one column his aggregate monthly payments for grain, and in another an aggregate monthly amount of sales. His books did not show what moneys were expended in carrying on the business nor what sums were taken out for household and family expenses. *Held*, That the books did not answer the requirements of the law. 268

*In re* Daniel G. Brown.

The bankrupt resided in this State, but did business in New Jersey. On the 27th of July, 1878, a creditor's petition was filed in the district of New Jersey. The proceedings were contested, references had, and much testi-

mony taken, and on or about March 1, 1879, an order of adjudication was entered. On August 31, 1878, the day the Bankrupt Law expired, a creditor's petition was also filed in this district, and an order to show cause issued returnable October 5, 1878. This order was not served, and on the 5th of Feb., 1879, a new order was issued returnable Feb. 15, 1879. On the return day of the latter order an order of adjudication was entered by consent. It appeared that the case was not put upon the calendar for Feb. 15, 1879, and that the attorney for creditors in the New Jersey case was thereby prevented from appearing to oppose an adjudication. On the 4th of March, 1879, the bankrupt procured an order staying all proceedings in the New Jersey case. *Held*, That the provisions of General Order No. 16 did not apply; and that, under the circumstances, the adjudication in this case should be set aside and all proceedings stayed pending the proceedings in the district of New Jersey. 270

*In re* Cunningham.

Funds in the hands of an assignee in bankruptcy cannot be reached by process of garnishment. 276

*In re* Kaufman & Houck.

The claimant, who had for several years held a chattel mortgage executed by the bankrupts, took possession under the mortgage upon learning of their insolvency, and, within four months of the filing of the petition in bankruptcy, sold the property and became the purchaser at the sale. The assignee in bankruptcy brought suit against him and recovered judgment for the value of the property, the jury finding that the claimant was guilty of actual fraud in obtaining and holding the preference. The judgment having been paid, the claimant proved his claim in full. On motion to expunge, *Held*, That claimant could not prove his whole claim, but could prove a moiety thereof. 283

*In re* Bryce & Smith.

A creditor who has not proved his debt cannot take part in composition proceedings, although he has been permitted to intervene in the proceedings upon the creditor's petition for adjudication and to act therein upon the reference. 287

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# SYNOPSIS OF CASES, No. 7.

Robinson et al. *v.* Hanway.

An involuntary petition in bankruptcy cannot be maintained by a copartnership against one of its members.

The original petition in this case was signed exclusively by the partners constituting the firm of which defendant was a member. Intervening petitions, sufficient of themselves as to number and amount to constitute the necessary quorum, were afterwards filed. *Held*, That the original petition was void for want of proper petitioners, and did not give the court jurisdiction, and that the intervening petitions were also void for want of an original petition to give them force. 289

*In re* Oliver & Young.

Where the Supreme Court of a State has decided that, under its chattel mortgage law, mortgages are void as to all creditors who become such between the giving and recording of the mortgage, the District Court will adopt such construction, and hold such mortgages void as against the assignee in bankruptcy of the mortgagor, where debts were contracted after the execution of the mortgage.

*Sawyer* v. *Turpin*, 91 U. S., 114, distinguished. 291

*In re* Archibald Baxter et al.

The question as to how much the trustee shall pay counsel for services is one of the matters which, under the statute, are submitted to the discretion of the committee, and the court cannot, if their discretion is exercised in good faith, interfere with their decision, even though the amount allowed is largely in excess of what the court would think reasonable.

It is not necessary that the committee should be unanimous in all their directions to the trustee; the question submitted to them should be decided by a majority vote, and the act of the majority, all having an opportunity to be heard, is the act of the committee. 295

*In re* Marsh & Burnett.

The statute (Sec. 5110, sub. 7) requires that the books kept by the bankrupt shall be proper—that is, for their purpose, which includes being honest—but does not go so far as to require that they shall show where losses accrued, or how.

The bankrupts were engaged in buying and selling hemlock bark and lumber, each taking charge of each branch. They kept no cash-book, but kept bank accounts showing the amount received, and each kept a book professing to show what amounts and to whom each paid. There was no claim that money had been paid by either and not entered on his book, or that any had been entered which had not been paid. *Held*, that the books kept were proper for the business done. 297

*In re* Hicks, Stewart & Rosenburg.

If, before proof is made against the endorser, a dividend is received by or has become payable to the creditor on the note from the estate of the maker, he can prove only for the balance. Nothing, however, short of payment, or the present right to receive a dividend, will operate to reduce the creditor's right to prove against the endorser's estate.

The claimant held certain notes endorsed by the bankrupts. The makers were adjudged bankrupt, and effected a composition with their creditors June 11, 1878, and gave notes for the composition payments, dated that day, and payable in three, six, and nine months. The claimant refused to receive the notes offered him until September 25, 1878, when, one note having matured, he accepted cash for that note and the other two notes. On September 9, 1878, he proved his claim for the whole amount of the original notes in this proceeding. On application to reduce proof, *Held*, That the proof was correct; that the claimant, at the time of proof, had not received nor become entitled to receive anything in part payment of the debt from the maker's estate which he was required to credit on the notes. 299

*In re* James S. & John N. Clark.

In order to defeat a discharge on any of the grounds specified in Sec. 5110, the creditors must take the initiative. The court will not become the actor when interested parties are quiet, except where there is a question

that such ground of suspicion exists, may be allowed so to intervene. But for this purpose formal proof of debt is not required, and such admission of the creditor to intervene specially for this purpose does not and ought not to impair that security which every creditor, appearing at a composition meeting, may well require as to the genuineness of the claim of every other creditor who appears and claims the right to vote or take part in and affect the proceedings of the meeting. And the rule and practice above referred to do secure this protection to the creditors, by requiring that formal proof of claims which for the participation in the case for other substantial purposes the law requires.

Motion denied.

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UNITED STATES DISTRICT COURT—W. D. PENNSYLVANIA.

SEPTEMBER 10, 1879.

An involuntary petition in bankruptcy cannot be maintained by a copartnership against one of its members.

The original petition in this case was signed exclusively by the partners constituting the firm of which defendant was a member. Intervening petitions, sufficient of themselves as to number and amount to constitute the necessary quorum, were afterwards filed. *Held*, That the original petition was void for want of proper petitioners, and did not give the court jurisdiction, and that the intervening petitions were also void for want of an original petition to give them force.

## *J. Q. ROBINSON et al.* v. *CASTNER HANWAY.*

THIS was a proceeding in involuntary bankruptcy.

The facts appear fully in the opinion.

*J. M. Kennedy* and *W. McCullough*, for Robinson et al.

*Knox & Reed*, for Castner Hanway.

PER CURIAM:—It was agreed by counsel at the trial that the jury should find the specification of the suspension of the payment of commercial paper as true, and that the defendant

should be adjudged bankrupt thereon, subject to the question reserved by the court, whether the original petition filed in the case is valid; the petitioners, The Farmers' Bank, being a partnership, and the defendant a member thereof at the time of filing the petition.

At common law, no action could be sustained by a partnership firm against one of its members, and no legislation has authorized it, for the reason that the defendant would stand in the attitude of suing himself, being both plaintiff and defendant—a legal absurdity. And further, the trial would necessitate the settlement of account between the firm and the defendant, only properly done in account render, or by bill in equity.

In bankruptcy there is no provision for a firm to put one of its number into bankruptcy, and probably for the same reasons. In an adjudication in involuntary bankruptcy, questions similar to those in actions at common law arise, and are decided upon the same principle. The first thing to be made out by the petitioning creditor before the jury is his claim against the defendant, and in the case of a firm pursuing one of its members, the defendant would become plaintiff and defendant, with the same consequence as in an action at law. In this case the original petition is signed exclusively by the partners constituting the firm, including the defendant, by John Markle, acting for the firm. It was filed March 13, 1878. At a subsequent period intervening petitions, though not till after the repeal of the Bankrupt Law, making of themselves sufficient in number and amount to constitute the quorum required, were filed. Bnt we are of opinion that the original creditors' petition is void for want of proper petitioners, and did not give the court jurisdiction of the case, and that the intervening petitions are also void for want of an original petition to give them force.

It is not a case of amendment of a defective petition of which the court has jurisdiction, and when the interveners perfect the petition by additional numbers and amounts. But it is an attempt to give life to a dead petition, to engraft branches upon a lifeless stock, and infuse vitality into it. The interveners must draw their support, if at all, from the original petition;

but in this case the original petition is dead, and neither supports the interveners nor itself.

The judgment of the court is in favor of the defendant, *non obstante veredicto*, and that the petition be dismissed for want of jurisdiction.

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UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Where the Supreme Court of a State has decided that, under its chattel mortgage law, mortgages are void as to all creditors who become such between the giving and recording of the mortgage, the District Court will adopt such construction, and hold such mortgages void as against the assignee in bankruptcy of the mortgagor, where debts were contracted after the execution of the mortgage.

*Sawyer* v. *Turpin*, 91 U. S., 114, distinguished.

## *In re OLIVER & YOUNG.*

On the petition of Isaac Young that the assignee be required to pay over to him the proceeds of certain mortgaged property. The petition alleged that petitioner held a mortgage of personal property, executed by the bankrupts to him August 12, 1877, but not recorded until November 29th of the same year. The mortgage covered certain goods, from the sale of which the assignee received the money now in his hands. Bankruptcy proceedings were instituted December 12th. The answer of the assignee admitted the giving and recording of the mortgage at the dates named, his appointment as assignee, and the fact that he had in his hands nearly one thousand dollars, the proceeds of the sale of the mortgaged property; but denied that he should pay that amount to the petitioner, for the reason that, practically, all of the debts proven against the bankrupts' estate were contracted before such mortgage was recorded, and claimed that, under the statutes of this State, the mortgage was absolutely void as against such creditors, and, consequently, against himself, as representing them.

*Shepard & Lyon*, for the petitioner.
*Mr. Cooley*, for the assignee.

BROWN, J.—There is no question that the mortgage was given for a valuable consideration, passing at the date of its execution. It is claimed, however, that the debts of the bankrupt were mainly contracted after the giving of the mortgage, and before its filing; that it was not filed until fourteen days before the commencement of bankruptcy proceedings, and that it is, therefore, invalid as against the assignee.

Section 4706, of the compiled laws of this State, provides: "That every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels not accompanied by immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against *the creditors of the mortgagor*, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage shall be filed," etc. The act does not define who are *creditors* within the meaning of this section, and it is left for the courts to determine whether it applies to those who have levied upon the stock by virtue of an attachment or execution before the mortgage is filed, or to all those who became creditors between the execution and filing of the mortgage.

A similar statute in Massachusetts, declaring that no such mortgage should be valid "against any other persons than the parties thereto," unless recorded, was considered by the Supreme Court of that State in *Mitchell* v. *Black* (6 Gray, 100). In that case it was held that one who had taken bills of sale of merchandise from his debtor, as security for money advanced, and who had allowed the debtor to sell portions of the merchandise, in the usual course of his business, as if he were the owner thereof, might take possession of it at any time, in order to secure his debt, and that such taking of possession, though at a time when the debtor was known by himself and the creditors to be insolvent, was effectual, notwithstanding the State Insolvent Law, which contained provisions very like those of the Bankrupt Act. In speaking of the registration of mortgages, the court observed: "The time when the record shall be made is not specifically prescribed by the statute, though it must undoubtedly precede the possession by others subse-

quently acquiring an interest in the mortgaged property. To prevent it from passing to them, it will be sufficient that the record is made at any time before such possession is taken, though it be long after the execution of the mortgage." A somewhat similar case came before the Supreme Court of the United States, on appeal from the Circuit Court for the District of Massachusetts, in *Sawyer* v. *Turpin* (13 N. B. R., 271, 91 U. S., 114). In this case a bill of sale of personal property was executed on the 15th of May, 1869, but the conveyance was not recorded, nor was possession had thereunder. On the 31st of July this bill of sale was surrendered, and a chattel mortgage upon the same property executed in exchange therefor, but this mortgage was not recorded until the 17th of September. Proceedings in bankruptcy having been commenced within little more than a month thereafter, the assignees filed their bill in the District Court to set aside this mortgage as a fraudulent preference. In passing upon the question, the Supreme Court adverted to the case of *Mitchell* v. *Black*, above cited, and adopted the construction given therein to the Chattel Mortgage Law of Massachusetts, and held that, as the mortgage was recorded before the rights of the assignee in bankruptcy accrued, it could not be impeached by the complainant, and the court added that, even if the failure to put it on record enabled the debtor to maintain a credit he ought not to have enjoyed, it could make no difference, as the Bankrupt Act was not intended to prevent false credits. Other cases to the same effect are: *In re* Wynne (4 N. B. R., 23); *Miller* v. *Jones* (15 N. B. R., 150); *In re* Griffiths (3 N. B. R., 731); *Cragin* v. *Carmichael* (11 N. B. R., 511, 2 Dill., 519); *Seaver* v. *Spink* (8 N. B. R., 218); *Player* v. *Lippincott* (4 Dill., 125); *National Bank of Fredericksburg* v. *Conway* (14 N. B. R., 513).

The same question came before this court in the case of *In re* Barman (14 N. B. R., 125), in which the mortgage was made on the 9th of August, but was not filed until the 8th of December, nor possession taken until January. It was conceded that the mortgage was given for a present consideration, and would have been valid, if filed when executed, as against

bankruptcy proceedings; but that, as it was not filed until December, it should be regarded, as against the assignee of the bankrupt, as taking effect from that date. *As the Supreme Court of this State had not then settled the construction* to be given to the word "creditors" in the Chattel Mortgage Act, I felt constrained to follow the case of *Sawyer* v. *Turpin*, as giving a construction to a similar statute of another State, although I was aware at the time that such construction was putting it in the power of debtors to defeat the purposes of the Bankrupt Act, by giving chattel mortgages upon their stocks in trade, and persuading the mortgagee to keep them off the record, to the prejudice of creditors, who might have trusted them upon the faith of their apparent ownership of the property.

But, at the last term of the Supreme Court of this State, a construction was given to this statute in the case of *Feary* v. *Cummings* (1 N. W. Rep., 74), different from that given by the Supreme Court of Massachusetts to the statute of that State. In this case the mortgagees, who had purchased the mortgaged property upon foreclosure, were sought to be held as garnishees of the principal debtor. It appeared the mortgage was made October 8, 1877, but was not filed until May 28, 1878. Plaintiffs became creditors of the mortgagor, the principal defendant, between the giving and the filing of the mortgage, although they did not obtain judgment until September, 1878, after the seizure and sale of the property to the mortgagee. The court held that, if the mortgage was not put on file prior to the plaintiffs becoming creditors, it was invalid as against them, "the law being that those who become creditors while the mortgage is not filed are protected, and not merely those who obtain judgments or levy attachments before the filing;" and that, although no creditor could impeach the mortgage before taking proceedings against the property, yet, if such proceedings were taken, he would be considered as a creditor within the meaning of the section, if his debt accrued between the giving and filing of the mortgage; citing in this connection *Thompson* v. *Van Vechten* (27 N. Y., 568), where a similar

construction was given to the statute of that State. (See also *Bostwick* v. *Foster*, 14 Blatch., 436; *Harris* v. *Exchange National Bank*, 4 Dill., 133; *Moore* v. *Young*, 4 Biss., 128; *Allen* v. *Massey*, 4 N. B. R., 248; *Harvey* v. *Crane*, 5 N. B. R., 218.)

The construction thus given to this statute is obligatory upon this court, and I must therefore hold in this case that the petitioner can take nothing by his mortgage. The petition is therefore dismissed.

Since this opinion was prepared, the case of *Platt* v. *Preston*, decided by Judge Choate, has appeared in the Bankruptcy Register, Vol. XIX., p. 241. In that case the same conclusion was reached, for the same reasons here given.

The mortgage is not rendered invalid by the Bankrupt Law, or because the filing constitutes a preference, but it may be set aside by the assignee, because, by the law of the State, it is void as against the creditors whom he represents.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JUNE 13, 1879.

**The question as to how much the trustee shall pay counsel for services is one of the matters which, under the statute, are submitted to the discretion of the committee, and the court cannot, if their discretion is exercised in good faith, interfere with their decision, even though the amount allowed is largely in excess of what the court would think reasonable.**

**It is not necessary that the committee should be unanimous in all their directions to the trustee; the question submitted to them should be decided by a majority vote, and the act of the majority, all having an opportunity to be heard, is the act of the committee.**

## *In re ARCHIBALD BAXTER et al.*

THE facts appear fully in the opinion.

*Kelly & Macrae*, for petitioner.
*Abbott Bros.*, for trustee.

CHOATE, J.—This is an application by one of a committee chosen by the creditors to assist the trustee in the management

of the bankrupt's estate under R. S., Sec. 5103, for relief against the action of the trustee in the allowance of what are alleged to be excessive counsel fees for services rendered to the estate. It is not claimed that the allowances made by the trustee, and approved by the majority of the committee, are not made in good faith. It is claimed that they are grossly excessive for the services performed; that it is within the power of the court to correct such an error of judgment on the part of the committee; and especially that the committee can only act by unanimous vote, and that as one of them dissents from the allowances made, their action on this matter is thereby nullified, and of necessity the court must decide the question.

I think the question how much the trustee shall pay counsel for services is clearly one of those matters which under the statute are submitted to the discretion of the committee, and that the court cannot, if their discretion is exercised in good faith, interfere with their decision, even though the amount allowed is largely in excess of what the court would think reasonable. The purpose and construction of that part of the Bankrupt Law providing for an administration of the estate by a trustee, under the direction of a committee of the creditors, are so fully and carefully stated in the case of *In re* Jay Cooke & Co. (11 N. B. R., 1), by Mr. Justice Strong, that it is only necessary to refer to that case as an authority on this point. The present case comes clearly within the reasoning of that decision.

There is nothing in the statute indicating that the committee must be unanimous in all their directions to the trustee. The number to be appointed on the committee is not fixed by the statute. It may be larger or smaller, as the creditors at their meeting shall determine. The theory of the statute is, that they will represent the whole body of the creditors, giving the trustee the benefit of their advice, and restraining his action by their action in the management of the estate. It is to be presumed that they are fairly representative of the views of the creditors, or intended so to be. To require entire unanimity of them, either in opinion or direction on all the diverse mat-

ters they are called upon to decide, would in my judgment be impracticable, and go far to defeat the very purpose had in view by the statute, and unduly embarrass the administration of the estate, leaving many questions of administration insoluble, except by an appeal to the court, for which no provision is made by the act, and which seems to be contrary to its primary intent of an administration of the estate by the creditors themselves, through their own chosen agents. It seems therefore to be the intent of the statute, that the committee by a majority vote shall decide all questions duly submitted to them, and that the act of the majority, all having an opportunity to be heard, is the act of the committee.

This application must therefore be denied.

## UNITED STATES DISTRICT COURT—VERMONT.

OCTOBER 20, 1879.

The statute (Sec. 5110, sub. 7) requires that the books kept by the bankrupt shall be proper—that is, for their purpose, which includes being honest—but does not go so far as to require that they shall show where losses accrued, or how.

The bankrupts were engaged in buying and selling hemlock bark and lumber, each taking charge of each branch. They kept no cash-book, but kept bank accounts showing the amount received, and each kept a book professing to show what amounts and to whom each paid. There was no claim that money had been paid by either and not entered on his book, or that any had been entered which had not been paid. *Held*, that the books kept were proper for the business done.

### *In re MARSH & BURNETT.*

THE facts appear fully in the opinion.

*J. J. Wilson*, for opposing creditors.
*Hunton & Stickney*, for bankrupts.

WHEELER, J.—This cause has been heard upon the application of the bankrupts for a discharge, and the specifications in opposition thereto. The specifications are, that the bank-

rupts did not keep proper books of account, because their books did not "show what moneys were received, or what disposition was made of the same;" and that they did not keep a cash book. No question can properly be considered except such as arises with reference to these specific grounds. The grounds are confined to whether they kept proper books in respect to the receipt and payment of cash. What would be proper in this behalf must depend upon the nature of the business and the mode in which it was conducted. They bought hemlock bark and lumber, each taking charge of each branch, and forwarded it to customers by public conveyance. They kept bank accounts showing what money each received, and each kept a book professing to show what amounts and to whom each paid.

The counsel for the opposing creditor frankly states that they show no instance in which either paid money which he did not enter on his book, and none in which either entered money as paid which he did not pay; but claims that, by averaging the profits on what of the business they can trace with the result of the whole, they show a large proportion of business not to have been entered.

This method has too long a range to hit the object of the provision of the statute relating to books of account.

The statute requires that they should be proper—that is, for their purpose, which includes being honest—but does not go so far as to require that books shall show where losses accrued, or how. The same provision was in the Act of 1841, and in the English statutes, and was construed as requiring that the books should not, in what they showed, or failed to show, be fraudulent.

The same provision, when adopted in the Act of 1867, must be considered as having been adopted in view of the construction which it had received.

In this view, it cannot be justly held that the books shown to have been kept in this case were not proper for the business done.

Discharges granted.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JUNE 27, 1879.

If, before proof is made against the endorser, a dividend is received by or has become payable to the creditor on the note from the estate of the maker, he can prove only for the balance. Nothing, however, short of payment, or the present right to receive a dividend, will operate to reduce the creditor's right to prove against the endorser's estate.

The claimant held certain notes endorsed by the bankrupts. The makers were adjudged bankrupt, and effected a composition with their creditors June 11, 1878, and gave notes for the composition payments, dated that day, and payable in three, six, and nine months. The claimant refused to receive the notes offered him until September 25, 1878, when, one note having matured, he accepted cash for that note and the other two notes. On September 9, 1878, he proved his claim for the whole amount of the original notes in this proceeding. On application to reduce proof, *Held*, That the proof was correct; that the claimant, at the time of proof, had not received nor become entitled to receive anything in part payment of the debt from the maker's estate which he was required to credit on the notes.

## *In re HICKS, STEWART & ROSENBURG.*

THE facts appear fully in the opinion.

*D. J. H. Wilcox*, for creditor.
*Jos. Dunne*, for trustee.

CHOATE, J.—This is a motion to reduce a proof of debt. The creditors held notes made by the firm of Greenbaum & Haas, endorsed by the bankrupts. The makers of the notes were adjudged bankrupts in May, 1878, and in June, 1878, they effected a composition with their creditors, the composition payments to be in three, six, and nine months, and for which composition notes were given for those periods respectively, dated June 11, 1878. The creditor was offered the composition notes to which he was entitled, but refused to receive them until the 25th of September, 1878, when one of them having matured, he accepted cash for that note and the other two notes. Meanwhile, on the 9th of September, the endorsers having been adjudicated bankrupts, the creditor proved against their estates for the whole amount of the original

notes. The trustee of the bankrupts now claims that instead of proving for the whole amount of the original notes, the holder is entitled to prove only for the balance after deducting the amount of the composition.

The general rule that the holder of negotiable paper is entitled to prove both against maker and endorser for the amount of the notes, and receive dividends from both estates up to the full amount of the debt, is well established. (*Ex parte* Talcott, 9 N. B. R., 502; *In re* Baxter, 18 Id., 497.) If, however, before proof is made against the endorser, a dividend is received by or has become payable to the creditor on the note from the estate of the maker, he can prove only for the balance. If he has received payment of a dividend, the debt against the indorser is to that extent reduced. If a dividend has become payable, but he has neglected to collect or refused to receive it, although in some sense it may be true that the debt has not to that extent been in fact paid, yet he is compelled to credit the amount as if paid, because it is his own fault that he has not received it, and it is held by the assignee for him on demand, and it would be inequable and unjust to permit him, by refusing or neglecting to take it, to obtain a larger share of the estate of the endorser than he would be entitled to if he had taken it. Nothing, however, short of payment or the present right to receive a dividend seems to operate to reduce the creditor's right to prove against the endorser's estate, and for the very obvious reason that nothing short of this reduces the debt of the endorser then owing to the holder. In the present case, at the time proof was made against the endorser no dividend had been paid or become payable to the creditor out of the estate of the maker. The first composition note was not yet due. The composition notes are but evidences of the agreement to pay the stipulated composition. By the very terms of the act, compositions must be paid "in money." If, before proof of debt against the endorser, one of them is paid, it would seem to operate as part payment of the debt as between the holder and the endorser; but until it is paid, or becomes due, the bankrupt at the time of its maturity being ready and able

to pay it, it can at most be regarded as between the holder and the endorser merely as collateral security, given to the holder by the maker, which cannot affect his rights against the endorser. It is not true, as claimed by the trustee, that the mere giving of composition notes in itself operates as an extinguishment of the original debt, so that they are to be treated as a payment presently made as between the holder and the endorser.

I think in this case the creditor had not received nor become entitled to receive anything in part payment of the debt of the estate of the maker at the time of his proof against the estate of the endorsers which he was required to credit on the notes.

Motion denied.

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UNITED STATES DISTRICT COURT—NEW JERSEY.

SEPTEMBER, 1879.

In order to defeat a discharge on any of the grounds specified in Sec. 5110, the creditors must take the initiative. The court will not become the actor when interested parties are quiet, except where there is a question as to whether the modal requirements of the law have been complied with.

## *In re JAMES S. CLARK and JOHN N. CLARK.*

NIXON, J.—This is an application for a discharge by two partners, the firm having been adjudicated bankrupt.

The register has made a special report in the case. He says that the bankrupts have conformed to all the modal requirements of the law, and that he recommends their discharge, unless the court will take notice of their violation of the fifth clause of Section 5110 of the Bankrupt Act, without any appearance of opposing creditors or specification against their discharge.

No creditor has formally resisted their application for a discharge; but an extended examination of the bankrupts

before the register, pending the proceedings in bankruptcy, shows quite conclusively that the applicants had given fraudulent preferences, contrary to the provisions of the law, by the payment to a number of their creditors, in full, when they were hopelessly insolvent, and knew that they were so.

It has been held, and I think properly, that in order to defeat a discharge on any of the grounds set forth in Sec. 5110, the creditors must take the initiative. (*In re* Schuyler, 2 N. B. R., 549; 3 Ben., 200; *In re* Rosenfield, 2 N. B. R., 117.) If they do not enter an appearance and file specifications, they are not regarded as opposing the discharge, but, on the contrary, as assenting to it.

The court cannot be expected to become the actor, when interested parties are quiet, except in those cases where there is a question whether the modal requirements of the law have been complied with.

The discharge will be granted.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

DECEMBER 5, 1879.

The fact that the bankrupt failed to keep proper books of account in a business which has been entirely closed out, there being no debts due to nor owing by him arising out of such business, will not prevent a discharge.

Nor will a discharge be prevented by the fact that he failed to keep proper books of account in his business prior to the passage of the Bankrupt Act.

## *In re ISAAC FRIEDBERG.*

THE facts appear fully in the opinion.

*Carpenter & Hays*, for bankrupt.
*C. Blandy*, for opposing creditors.

CHOATE, J.—This is an application for the discharge of the bankrupt. The only specification of which any proof is offered that requires any consideration, is that the bankrupt, since

March 2, 1867, being a merchant or tradesman, kept no books of account. It appears that prior to April, 1874, for a short time, the bankrupt was engaged in the business of buying and selling tobacco and cigars, and that in that business he kept no books of account. But it further appears that that entire business is closed out, there being neither debts due to him nor owing by him which arose out of that business.

The case is therefore exactly like the case of *In re* Keach (3 N. B. R., 13), in which Judge Lowell held that the failure to keep books in such a case did not prevent the granting of a discharge. I entirely concur in the reasoning on which that decision was rendered. It further appears that very many years before the bankruptcy, the bankrupt was engaged in some business from which there may be some uncollected claims still due to him, but the evidence does not show that the business was continued after the 2d of March, 1867.

Discharge granted.

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UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

FEBRUARY 17, 1879.

Mere delay in obtaining the requisite number of signatures to a composition, unaccompanied by laches, will not justify a refusal to record the composition.

A resolution proposing a composition of seventy cents, to be paid within thirty days after recording the resolution, upon condition that all the property of the bankrupts be surrendered to them, and all pending suits discontinued, is not improper.

## *In re CAVAN & SHELDON.*

Upon objections to the recording of a resolution of composition of the creditors.

*Don M. Dickinson*, for the objecting creditors.
*William H. Wells*, for the composition.

Brown, J.—Three objections were interposed to the recording of the composition in this case.

*First.* That the proceedings have been unreasonably delayed. In evidence of this, it appears that the resolution was passed and adopted at a meeting of the creditors, on the 22d day of May, 1878; but that the signatures of the requisite number of creditors were not all obtained, nor the required notice given for the objecting creditors to come in and oppose a confirmation, until December. It further appears, however, that on the 9th day of March certain creditors of the bankrupts began suits against them, and caused writs of garnishment to be issued against certain insurance companies which were largely indebted to the bankrupts; that, subsequent to the filing of the petition in bankruptcy, which was in April, application was made on behalf of the bankrupts to the attorneys of these creditors, to discontinue such suits, in order that the expense and delay of appointing an assignee in bankruptcy, who could move for their dismissal, might be avoided; that some correspondence was had with these attorneys and with other persons, which was continued until about the 17th day of July, to which date the meeting of the creditors for the election of an assignee had been from time to time adjourned, and upon which day an assignee was finally chosen, and on the 26th of July an assignment was made to him by the register; that shortly prior to this the judge of the court left the city, and did not return until late in September; that, within a few days after his return, application was made to the court for a dismissal of these suits, which was granted, and, from that time, proper diligence was used in collecting the amounts due the bankrupts' estate from the insurance companies, and in the prosecution of the composition proceeding. I do not think that mere delay, unaccompanied by laches, is any ground for refusing to record this composition. I think the delay in this case is excusable, and that I ought not to refuse to record the composition upon that ground.

*Second.* That the composition is conditioned upon contingencies beyond the control of the creditors, and which are unreasonable and unlawful. The resolution submitted to the creditors proposed a composition of seventy cents, to be paid

within thirty days after the recording of the resolution, "upon the condition that all the property of the said bankrupts be surrendered to them, and all pending suits be discontinued."

Postponement of payment for thirty days is obviously no objection. These resolutions frequently provide for payment in installments at different periods, and such provisos have been uniformly sustained.

The condition that all the property of the bankrupts be surrendered to them is no more than the law would imply if the resolution had been silent upon this point. (*In re* Reiman & Friedlander, 11 N. B. R., 21.) In any event it is mere surplusage, and may be disregarded. (*In re* Van Auken, 14 N. B. R., 425.)

The learned judge held, in that case, that such a condition bound no one, neither the creditors nor the court, and that, upon the application of any creditor, a warrant of seizure might issue, notwithstanding the terms of the composition as to the retention by the debtors of their assets.

The condition that all pending suits be discontinued was solely for the benefit of the bankrupt. If the tender of the seventy per cent. was made within the thirty days, the creditor would not be at liberty to refuse it because pending suits were not discontinued, as he would get no more than the seventy per cent. if they had been discontinued. It was a condition with which he had practically nothing to do. If the tender were not made within the thirty days, the composition would fall through, and cease to be operative. The bankrupts could not compel their creditors to receive the dividend, nor could the creditors compel the bankrupts to pay it. There would be no want of mutuality, since the composition would cease to exist at the expiration of thirty days. Until the expiration of the time limited by the resolution, the composition is regarded as still pending. (*In re* Hinsdale, 16 N. B. R., 550.) After the expiration of the thirty days, the proceedings become a nullity, and the assignee may proceed to settle the estate.

*Third.* That a confirmation of the resolution by the signature of the creditors was secured by the purchase of claims,

and not by a free and full expression of the wishes of the creditors. The only evidence of that is contained in the affidavit of one Jones, the agent of one of the creditors, who says that, some time during 1878, he visited Houghton, and was there informed by Cavan that he had purchased the claims of other creditors against them, at a less price than their face, affiant believing that such claims were voted in favor of the composition contrary to law. In rebuttal of this, it appears that all claims against the estate were proved by the creditors in person, who made the usual oaths that they were the *bona fide* owners of the claims, and that no agreement had been made or entered into on their behalf to dispose of the claim, or to receive any consideration whereby their vote should be in any way affected, influenced, or controlled. It further appears that, on the 10th of December, 1878, the bankrupts appeared before a notary public at Houghton, and answered certain interrogatories propounded by the register, in which they declared that they had not paid, or offered to pay, or promised to pay any creditor any sum other than that specified in their proposed compromise, in order to induce the creditor to accept it; that they had never entrusted to any attorney, or other agent, any money or property for the purpose of being employed to induce any creditor to accept the composition; and that they had never authorized any attorney or agent to promise any money or property to induce any creditor to accept the composition. It seems to me this objection is not made out.

I think the composition should be recorded, but that the bankrupts' estate should not be surrendered to them until the expiration of the thirty days.

[On appeal to the Circuit Court (Judge Baxter) this decision was *affirmed*.—Ed.]

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

NOVEMBER 26, 1879.

**An appeal having been taken from an order allowing to a creditor interest upon his unpaid dividend at the rate of seven per cent. from the time said dividend was payable, the creditor procured an order directing the trustee to deposit in a trust company the amount of such dividend, interest and costs, to abide the result of the appeal. This was accordingly done, and the order having been affirmed on the appeal, *Held*, That the deposit of the moneys was not a setting aside of certain moneys as constituting the creditor's dividend, but was merely a change of investment by the trustee for the greater security of the creditor; that there was no waiver of the latter's right to full interest; that he was not confined to the rate of interest which the deposit earned, but was entitled to the full rate of interest from the day the dividend became payable to the day it is paid.**

## *In re HENRY KITZINGER et al.*

THE facts sufficiently appear in the opinion.

*C. W. Bangs*, for creditor.
*J. Dunne*, for trustee.

CHOATE, J.—It has heretofore been held in this case that a creditor, the payment of whose dividend has been delayed by the action of the trustee in contesting his claim, is entitled, as between himself and the other creditors, to be allowed interest on his dividend from the time the dividend would have been payable to him during the period of such delay at the current rate of interest. From the order entered allowing this claim of one Goldman as a creditor, with interest, in accordance with that decision, the trustee appealed and the order has now been affirmed. Meanwhile, and during the pendency of the appeal, the creditor gave notice that he would apply on the order entered, and on all the proceedings in the case, for "an order directing the trustee to deposit in the United States Trust Company, to the credit of this matter, the amount of the dividend including the interest thereon, and of the costs and disbursements, directed by said order to be paid by said trustee to said Goldman, etc., to be held by the said Trust Company pending

and subject to the said appeal, and to the further order of the court thereon, and also that the said trustee be required to execute and deliver to said Goldman a bond, with sufficient sureties, conditioned to pay to the said Goldman interest at the rate of seven per cent. upon the amount of the said dividend or of the moneys so to be deposited in the said Trust Company, if upon said appeal the said order shall be affirmed, or, in default thereof, that the said trustee be required to comply with the said order." Upon this motion, after hearing the parties, an order was made directing the trustee to deposit in the United States Trust Company the amount of the dividend and interest at the date of such order, but not requiring the trustee to give a bond as asked for.

The deposit in the Trust Company has earned interest only at the rate of two and a half per cent., and the trustee now claims that since the date of that deposit the creditor is entitled to no greater interest than the deposit has earned.

It was suggested heretofore that in case of such a deposit of a creditor's dividend pending a re-examination, "perhaps there might be no just claim for interest beyond the interest earned on the deposit." (*In re* Kitzinger, 19 N. B. R., 238). The case at that stage did not present this precise question as it now arises. I think that what was done in this case was not the setting aside of certain moneys as constituting this creditor's dividend, but merely a change of investment by the trustee for the greater security of the creditor as a condition of staying the execution of the order pending the appeal. This is certainly all that the creditor asked for in his motion, and all that the order for the deposit can fairly be interpreted to mean. This being so, and notwithstanding the expression indicating doubt on this question contained in the former opinion of the court, I think that what has been done constitutes no waiver of the creditor's right as between him and the other creditors to full interest, and that it does not affect his claim for interest. He has not by the deposit had the use or benefit of the moneys deposited. The moneys so deposited were not his moneys, but the moneys of the estate, and their earnings belong to the estate. The deposit

was merely to secure the payment to him of his dividend and interest, if the order allowing it to him should be affirmed. The amount to be paid under the order that has been affirmed is the dividend and interest thereon from the day it became payable to the day it shall be paid, at the rate of seven per cent. per annum.

## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

NOVEMBER 26, 1879.

One of the members of a committee appointed under Sec. 5103, rendered services to the trustee, at his request, in preparing for market and putting in condition to be sold, a large stock of tobacco, and also in effecting the settlement of an important litigation affecting the estate. On an application for compensation, *Held*, That the services were not such as the trustee could call on the committee to perform in the ordinary course of their duty; that it was inconsistent with the statute that they should be employed by the trustee to act in any other capacity for a compensation, and that the claimant was not entitled to compensation.

### *In re D. BLAKE BONNETT et al.*

THE facts appear fully in the opinion.

*H. C. Atwater, ex parte*, for motion.

CHOATE, J.—This is an application by one of the committee of the creditors, under Rev. Stat., Sec. 5103, to be allowed compensation for special services rendered to the trustee at his request. The services rendered were in preparing for the market, and putting in condition to be sold, a large stock of tobacco and cigars, which have been sold by the trustee at private sale, and also in going to Cincinnati and spending some nine days in effecting the settlement of an important litigation in which the estate was involved. The services rendered are shown to have been beneficial to the estate, and the amount claimed as compensation is not unreasonable, and the services rendered were not such as the trustee could call on the committee to perform in the ordinary course of the performance of their duty,

as members of the committee. The question therefore is whether such employment is compatible with the position which the committee hold towards the trustee and the estate. By the section above cited, it provided that, "if, at the first meeting of creditors, etc., three-fourths in value of the creditors, etc., shall resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt shall be settled by trustees under the inspection and direction of a committee of the creditors, the creditors may certify and report such resolution to the court, and may nominate one or more trustees to take and hold and distribute the estate under the direction of such committee." The section then provides for confirmation of the resolution by the court, and that in case it is confirmed, "the court by, order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors, and the trustee shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors, and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy, and the trustees shall have all the rights and powers of assignees in bankruptcy."

The Supreme Court has interpreted this section as meaning, with respect to the trustee, that he is entitled to the stated compensation allowed by the statute to an assignee, and extraordinary compensation to be allowed by the court upon the like proceedings as in case of an assignee (see General Order No. 30). No express provision is made for the compensation of the committee. Their powers under this section are very large, and their discretion in directing the assignee as to the proper performance of his duty on winding up and settling the estate is practically unlimited. So long as they act in good faith and keep within the range of lawful acts, they take the place of the court in advising and directing the trustee, and their duty and power embrace the entire range of the duty of the trustee in administering the estate. Their duties are *quasi* judicial. (*In re* Jay Cooke & Co., 11 N. B. R., 1.) In view of

the nature of the duties they are to perform, I think it is inconsistent with the statute that they should be employed by the trustee to act in any other capacity for a compensation. They cannot voluntarily, or with the consent of the trustee, withdraw from the position and duty which, by accepting the position assigned them by the creditors, they have assumed. The whole body of creditors have a right to insist that as to every detail of administration they should hold themselves ready to advise and direct the trustee impartially and without any personal interest which shall impair or affect their judgment. Such employment for compensation does withdraw the member of the committee so employed from this position. The very question whether the services he is employed to render are necessary and expedient, and for the best interest of the estate, and if so, who will be a suitable person to be employed to perform them, are clearly questions in the determination of which the trustee must act by the direction of the committee in the ordinary performance of their duty. It is no answer to say that a majority of the committee shall remain able to act on these questions. The creditors and the trustee are entitled to the services of all the committee. No doubt if all are able to serve, and are duly notified and consulted, a majority may act, but it is incompatible with the statute that any member of the committee should disable himself from acting. If he can do so, the trustee and creditors will to that extent be deprived of benefit of having the advice and direction of such a committee as was resolved upon by the creditors and approved by the court. It is obvious that if one of the committee may accept such employment, all of them may do so, and they may divide among them all the employment which the trustee may have to distribute with its emoluments. In the present case there is no suspicion of any intended wrong; but I am unwilling to make a precedent which is capable of so great abuse, and to authorize an employment which I think is impliedly forbidden by the statute. I am referred to a decision of Judge Fox in the case of *In re* Treat (10 N. B. R., 310). So far as that case is inconsistent with the

views herein expressed, I am unable to agree with its conclusions; the allowance was made in that case, however, on the theory that the services for which compensation was made were rendered by the member of the committee *in that capacity*. In the present case the services for which compensation is claimed seem to me not to be such as the trustee could have required of this petitioner as a member of the committee. The question whether, as officers of the court, the committee can, for their ordinary services, be allowed a compensation, is not before the court.

Motion denied.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

OCTOBER 20, 1879.

**The limitation contained in Section 5120, in relation to proceedings to annul a discharge, is absolute, and the time begins to run from the date of the discharge, and not from the discovery of the fraud.**

## *In re JOHN D. BROWN.*

APPLICATION to amend a discharge. The facts appear fully in the opinion.

*G. A. Seixas*, for petitioner.

CHOATE, J.—This is an application to the court for an order that the bankrupt appear and answer the petition of a creditor for amending his discharge. It appears by the petition that the discharge was granted July 27, 1877, more than two years before the date of the petition. The grounds on which relief is sought are that the bankrupt wilfully swore falsely to his schedules as to his assets, and fraudulently concealed certain property belonging to him, and omitted them from his schedules; that the fraud had been concealed by the bankrupt, and only discovered within two years of the filing of this petition. Section 5120 of the Revised Statutes provided

that "any creditor of a bankrupt, whose debt was proved or provable against the estate in bankruptcy, who desires to contest the validity of the discharge on the ground that it was fraudulently obtained, may at any time *within two years after the date thereof* apply to the court which granted it to amend the same."

It is insisted that this is to be construed like a statute of limitation, as being subject to the implied exception or condition that in case the cause of action is fraudulently concealed, the time of the accruing thereof shall be deemed to be the time of the discovery of the right to sue. It has been held that the two years' limitation from the time of the accruing of the cause of action, in case of suits by and against assignees in bankruptcy, is to be so construed. (*Bailey* v. *Glover*, 12 N. B. R., 24; *Nicholas* v. *Murray*, 18 id., 469.) In the case last cited it is intimated by Judge Deady that the same rule of construction would, he was inclined to think, be applied to this section. He did not, however, determine this question. In *Pickett* v. *McGavik* (14 N. B. R., 236), Judge Parker held that the limitation of two years was absolute, and not to be avoided by showing a fraudulent concealment of the grounds on which it was sought to annul the discharge. It appears to me that the language used, "two years after the date thereof," is not capable of that enlargement by construction that has been found possible in statutes of limitation generally.

The words used are positive and explicit. They differ from the words usually defining a limitation of suits, and I think they were designedly used to fix an absolute period of time when the question of the validity of the discharge would be set at rest, and when the debtor and those again trading with him might safely treat his discharge from his old debts as final. It would greatly impair the advantages supposed to be given to the community by the Bankrupt Law, in enabling a discharged bankrupt to enter into business free from his former embarrassments, if this limitation is not absolute, as it appears to be. In fact, as the only ground for annulling a discharge is that it was fraudulently obtained, and fraud is almost always secret

and concealed from the party defrauded, this limitation is practically no limitation at all, if it is avoided by any creditor's discovery of the fraud at any time after the discharge. The statute was designed, even in cases of fraudulent concealment, to impose a certain diligence of investigation and discovery on creditors. Indeed, the statute, in terms, is limited to cases of secret or concealed fraud, since it expressly requires proof that the creditor applying had "no knowledge of the same until after the granting of the discharge." The minds of the framers of this section, therefore, were directly called to the fact that the discovery of the fraud might not be made till after the discharge, and the language used shows clearly that they did not intend to limit the time from that discovery, but from the date of the discharge.

Order refused.

## UNITED STATES DISTRICT COURT—E. D. NORTH CAROLINA.

JUNE 10, 1879.

Where a creditor has not only agreed with his debtor to accept (with all his rights to seek and acquire information), but has received from him a less sum in full payment of his debt, without fraud committed by the debtor, such creditor is bound by such agreement and acceptance, and the binding force of the settlement does not depend upon ultimate results or the correctness of the judgment exercised by the creditor in that transaction.

One A. deposited certain moneys with the bankrupt's branch at Newbern, which was afterwards discontinued. In 1866 the bankrupt, not being able to redeem its circulation and pay other creditors in full on demand, made a public offer of twenty-five per cent. in gold or its equivalent. The agent of the branch bank, who was a personal friend of A., received from her a check for the full amount of her deposit, and paid her the dividend thereon at the rate of twenty-five per cent. in gold, and she expressed herself as satisfied with the arrangement. The check was entered on the teller's journal and A.'s account balanced, but it was not entered on the deposit ledger from which the schedule in bankruptcy was made out, and the amount deposited by A. appeared on such schedule as a debt due. It appeared that, after the settlement with A., other creditors were paid larger dividends, and that some were paid in full. On proof by A.'s administratrix, the entire amount of deposits was allowed. On re-examination, *Held*, That the payment to A. was offered and accepted as a compromise and full settlement of her claim against the bank; that no

fraud by word or act on the part of the bank or its agents was committed which induced A. to accept the compromise; and that such settlement was valid and binding.

*In re BANK OF NORTH CAROLINA. HARRIET J. FOY, Administratrix,* v. *CHARLES DEWEY, Assignee.*

APPLICATION for re-examination of proof of claim.

*A. W. Tourgee*, for creditor.
*Merrimon, Fuller & Ashe*, for assignee.

OPINION OF REGISTER.

This is a proof of debt by Harriet J. Foy, daughter and administratrix *de bonis non* of Elizabeth Smith, deceased, of Newbern, N. C., for the sum of two thousand two hundred and seventy dollars, the consideration of which was money deposited with the bank in 1861–'62, being the balance to her credit therein since June, 1862, evidenced by the deposit or individual ledger of said bank, and the sworn schedule annexed to the petition thereof in bankruptcy.

This claim as proven was formally audited, passed, and allowed by the register and assignee, under their respective hands, after the withdrawal of exceptions to the form and sufficiency of proof, to wit: August 13, 1875, and the debt was entered by the register upon the dividend list for payment.

On the 18th of August, 1875, the assignee informed the register that he had found upon the daily cash-book of the bank an entry purporting to be a settlement, compromise, and discharge of said debt, to wit: the check of Mrs. Smith to the bank for two thousand two hundred and seventy dollars, and the payment by the bank to Mrs. Smith therefor of the sum of seven hundred and twenty-six dollars and forty cents, or thirty-two cents on the dollar of said debt.

This entry bears date June 4, 1866, and has never been posted or transferred from the daily cash to the deposit ledger of the bank, and the last-named book, together with the sworn schedules in bankruptcy, still show due to Elizabeth Smith the

sum of two thousand two hundred and seventy dollars, without payment, compromise, set-off, or counter-claim.

The assignee insists that the entry in the daily cash-book balances this account, and that the proof must be expunged.

To this demand the claimant answers as set forth in the annexed certificate.

Mr. Chas. Dewey, the Assignee in Bankruptcy of the bank, was cashier of the bank throughout the entire period of this transaction, and familiar with all its details.

When this entry was exhibited by the assignee to the register and while inspecting it, the register interrogated Mr. Dewey, as to how such a compromise, so favorable to the bank, was effected. Mr. Dewey replied: "The bank prepared a statement showing that it was able to pay only thirty-two cents, and exhibited it to the creditors, whereby the compromise was effected."

"Did the officers of the bank regard it as insolvent at that time?"

"No; but the stay laws were in force, and we could not collect."

"Did your statement exhibited to the creditors set forth these facts as a reason why you were only able to pay thirty-two per cent.?"

"No; it just stated that the bank was only able to pay thirty-two cents on the dollar of its debt."

The deposit ledger of the bank shows that many persons having balances due them on deposits made in 1861–'62, including the highest officers and directors of the bank, checked them out, dollar for dollar, before and after this alleged "settlement" (June 4, 1866), and if any discount or compromise was obtained thereon the books of the bank do not show it as in this case. A schedule of the names of some of these is hereto appended, marked "B," showing date of drawing out, and the amount of balance so withdrawn.

At the same period of this alleged compromise certain persons, having intimate relations with the bank, and facilities for knowing its financial condition, purchased large quantities of

its bills and presented them for payment. They received fifty-five cents on the dollar, conditioned in writing between the bank and them that the bank would pay to them such additional sum or sums as it might from time to time pay to any of its most favored creditors, together with interest from date.

These certificates or agreements covered one hundred and nine thousand dollars, composed of bills purchased, and in part of ante-war deposits, and they have, since bankruptcy, been paid in full, with stipulated interest. A statement of these, showing names of the creditors, the amount, and, so far as is possible, the date of the stipulations, is hereto appended, marked "A."

Mrs. Smith was an aged widow lady, residing at a point remote from the bank, to which she could have no access for information, the books and financial condition of which she was supremely ignorant, leaving her to depend solely upon the representations of its officers. The statement exhibited to her was an official statement prepared, says Mr. Dewey, the cashier, in effect, for the purpose of promoting compromises with its creditors. Mr. Dewey says, under oath: "The bank concluded they were solvent," but, they said in their "statement" to the creditors, "we can only pay thirty-two cents on the dollar of debt!" If that meant only for the present time, while the disability to sue and collect the assets existed, then an acceptance of the thirty-two cents could not be construed into a compromise of the whole; it only meant: "We will pay you the balance when we are able; when the disability to sue ceases." But the bank did not inform their creditors that they were solvent, but in plain terms intimated the contrary in the "statement," the exhibition of which induced Mrs. Smith to accept a less sum of money for her debt than the debt amounted to. Such settlement between the bank and Mrs. Smith was obtained by misrepresentation, and was fraudulent, and void for want of consideration.

But the courts of North Carolina have gone beyond this, and held that the bare receipt of or agreement to receive a part of a debt in discharge of the whole, is void for want of

consideration. (*Bryan* v. *Foy*, 69 N. C., 45; *McKenzie* v. *Culbreth*, 66 N. C., 534; *Warren* v. *Skinner*, 20 Conn., 559; *Hays* v. *Davidson*, 70 N. C., 573; *Mitchell* v. *Sawyer*, 71 N. C., 70; *Wooten* v. *Sherrard*, 71 N. C., 374; *Love* v. *Johnson*, 72 N. C., 415.)

Again, the check of Mrs. Foy on the bank was for two thousand two hundred and seventy dollars. The bank only paid seven hundred and twenty-six dollars and forty cents upon it, as admitted by all; therefore there remains due and unpaid upon her check the sum of one thousand five hundred and forty-three dollars and sixty cents.

Since the date of this transaction the bank has been adjudicated bankrupt; paid all its known proven debt, amounting to upward of three hundred and seventy thousand dollars, with interest on the certificates heretofore described; all the costs of bankruptcy, including costs of collections, attorneys' fees, commissions, etc., amounting to several thousand dollars. It has compromised and compounded claims due the bank to a very large amount; has some thirty thousand dollars pending undetermined in the courts; a cash surplus of over thirty thousand dollars in the hands of the assignee, liable to two or three claims of this nature aggregating about eight hundred dollars, and to a claim for interest from adjudication of bankruptcy to final payment in full on debts proven.

I am of the opinion that the alleged "compromise," if any, was fraudulent and void for want of consideration, and that the assignee should pay to the claimant the said sum of one thousand five hundred and forty-three dollars and sixty cents and interest from the time which all other creditors have received interest upon their claims allowed; the said sum of one thousand five hundred and forty three dollars and sixty cents being the amount of said proven debt after deducting the sum actually paid upon her check, or order to the bank to pay the whole of said sum of two thousand two hundred and seventy dollars, together with ten dollars costs of this certificate. All of which is respectfully submitted.

A. W. SHAFFER, *Register.*

In re Bank of North Carolina v. Dewey.

BROOKS, J.—The deposition, or proof of debt, was filed in this case by Harriet J. Foy, as administratrix of Elizabeth Smith, on the 4th day of May, 1875, which was examined and approved as sufficient in form by the register. Subsequently, on the application of the assignee and certain creditors of the bank, the register reviewed his proceedings on said claim, under the provisions of the 34th Rule, as amended, and again determined that the proofs were sufficient in form, and ordered that the claim be placed upon the dividend list for *pro rata* payment. To which ruling and order of the register the assignee and creditors excepted, and demanded that the questions arising on the exceptions, and the evidence taken, be certified to the District Court.

The certificate of the register and the evidence taken by him is before me, and other witnesses have been examined in behalf of each of the parties to this controversy. And I have been aided by able arguments of the counsel, and have now given the facts and the law involved in the case full consideration.

The facts are as follows: Elizabeth Smith, the intestate of the plaintiff, deposited with the bankrupt corporation—at a branch of that bank at Newbern—on the 14th of January, 1862, two thousand and ninety dollars, and on the 5th day of March following one hundred and eighty dollars, making two thousand two hundred and seventy dollars. That these amounts were entered to her credit by deposit, on the deposit ledger (a book kept by the bank), and also on the teller's journal (another book kept by the bank). That schedule A, No. 3, filed with the petition of the bankrupt corporation in this case, was made out from the deposit ledger, and upon that the only entries in Mrs. Smith's account were the credits before mentioned. On that book there was no charge or entry of payment made to her. Accordingly the sum so deposited was scheduled and reported as a debt due and owing by the bank; that on the teller's journal Mrs. Smith's account was balanced by a charge of her check on the 6th day of June, 1866, for the entire sum to her credit. The check so charged was produced

on the trial, and the execution of it, by Mrs. Smith, was proved by the assignee in bankruptcy.

Mr. Dewey, the assignee, and Mr. Jones, were examined as witnesses. The former had been the cashier of the Bank of North Carolina, at the principal office at Raleigh, from a date anterior to the dates of the deposits mentioned, and Mr. Jones had been, from its origin, the cashier of the branch bank at Newbern.

By Mr. Dewey it was shown that during the year 1866 the bank, not being able to redeem its circulation and pay other creditors by paying the full sums demanded, and as they were demanded, was then paying its debts by compromise, when demands were made, at the rate of twenty-five per cent. in gold—or its equivalent in the then currency of the country. That, in the month of June, 1866, the equivalent of twenty-five cents in gold was thirty-two cents in national currency. That Mrs. Smith's check for two thousand two hundred and seventy dollars was sent to the principal bank at Raleigh (the branch at Newbern having been discontinued in 1862), through Mr. Jones, who had been the agent of the bank at Newbern since the discontinuance of the branch. That a check of the bank on a bank in New York for thirty-two per cent. of the deposit debt to the credit of Mrs. Smith was forwarded to Mr. Jones for Mrs. Smith, and that the balance, say one thousand five hundred and forty-three dollars and sixty cents, was charged to profit and loss, and the check charged to Mrs. Smith for the full sum on the teller's journal, which balanced her account, and through inadvertence no entry was made of this transaction in the deposit ledger. That a large amount of the bills of the bank was redeemed at that rate and some of the depositors were settled with at the same rate. That when creditors of the bank applied for information they were informed that the bank was settling with its creditors at that rate.

By the evidence of Mr. Jones it was shown that he was the agent and confidential friend of Mrs. Smith—who was considerably advanced in years; that at her request he drew the

check and witnessed the execution of it by her, forwarded the same, and received the check for thirty-two per cent., mentioned by Mr. Dewey; that amount, in money, he paid to Mrs. Smith in satisfaction of her claim, at which settlement she appeared to be and expressed herself as satisfied.

Mrs. Foy was examined in her behalf, and other witnesses were examined, by whom it was shown that, after the payment to Mrs. Smith, other claims against the bank were compromised and settled by the payment of higher proportions of the debt than thirty-two per cent.; that other creditors of the bank, who refused to accept the compromise offered, subsequently received the full amount of principal of their claims from the assets of the bank.

The questions of fact, to be determined in this case, are these:

First. Whether the payment of thirty-two per cent. of the sum deposited by Mrs. Smith was tendered by the bank and received by her as and for payment and satisfaction of her entire claim, or was that sum tendered and accepted only as a partial or *pro tanto* payment on that debt?

Secondly. If the sum paid was offered and accepted as a compromise and full settlement of the debt, then was the creditor induced to accept, as full payment, a sum so materially less than her demand, by reason of any fraud or deception practised on the part of the agents of the bank?

I hold it to be clear that the whole sum due Mrs. Smith was not satisfied and discharged upon the payment to her of less than the amount due, unless the sum paid was both tendered and accepted as and for payment and satisfaction in full of her demands, and was so understood by both debtor and creditor at the time of this transaction.

Referring to the testimony of Mr. Dewey and Mr. Jones, I am well satisfied that the payment made was offered and accepted as a compromise and full settlement of Mrs. Smith's claim against the bank, and that it was so understood at the time by both parties.

There can be no doubt as to the purpose of the bank; and

as to Mrs. Smith, her confidential friend, her agent, that one with whom she had trusted for years her money, says that the information upon which she acted came to her through him; that he received for and paid to her the sum paid, and that she appeared to be, and expressed satisfaction at the settlement.

The opinion of the Supreme Court of North Carolina in the case of *McKenzie* v. *Culbreth* (66 N. C., 534), and, following that, the case of *Witherington* v. *Phillips* (70 N. C., 444), are relied upon by the creditor to show that any payment of a less sum in money than the whole sum due will not discharge the debtor.

If that court intended to declare that when the amount paid by the debtor was tendered by him for compromise, payment, and for full satisfaction of the debt, and the same was accepted by the creditor without fraud on the part of the debtor, then I do not concur in that opinion.

We may be able to discover some reason in a requirement that an obligation evidenced by a writing under seal shall only be released or discharged by an instrument under seal. And, again, that obligations of a certain character shall only be binding upon the parties when the same shall be reduced to writing. In this age of progress, of the wonderfully increased as well as changed dealings between men, arising from trade and commerce, accelerated and multiplied as these have been by the wonderfully increased facilities for intercourse and trade, which were never enjoyed until within the last half century, it must appear as strange as it would seem to be hard upon the commercial man if the courts shall hold that he must pay, under all circumstances, to the last dollar, all his obligations, and even with the consent of his creditor, obtained without fraud on his part, he cannot obtain a discharge by paying less than the whole sum due.

It should be remembered that this is no construction of any statutory provision of the law, but the declaration by a high court of a principle of the common law. An accepted construction of a statute law must and will stand until its force is lost by its own limitation, or the same shall be altered or re-

pealed. Not so, however, with the common law, which is only common custom as applied to any given transaction not provided for by special legislation. These customs or laws are not applicable to changed customs or to obligations contracted under altogether different circumstances.

It should be remembered too that this is a Bankruptcy Court, charged with the duty and vested with the power of administering justice upon the principles of equity between creditor and debtor whose interests may be brought within the jurisdiction of the court.

The late Bankrupt Law was said by some to be a system of itself. If so, it was a system of compromise and discharges, many of the provisions of which are of much more doubtful propriety and justice than a rule can be which will discharge a debtor from his obligation when he shall tender a part, less than the whole sum due, as full payment, and the creditor accepts such sum offered as full payment, without being induced to do so by any fraudulent act or declaration of the debtor.

But for the clear statement of the learned judge who delivered the opinion in the case of *McKenzie* v. *Culbreth* (*supra*), it would not be seen that the question now being considered was presented in that case, for the positions stated in the syllabus of that case will scarcely be denied.

The statement of that case is concise, and as follows: The plaintiff claimed on a single bill. The defendant answered accord, etc., and, in support of this defence, offered a receipt given by the obligee for a less sum than the note called for.

His Honor instructed the jury that the legal effect of the receipt was only a payment to the amount specified in it, and operated only as a discharge of the note *pro tanto*.

It is not strange that his Honor, the presiding judge, upon such facts appearing, should have instructed the jury as he did. It is not stated that the sum paid by the debtor was tendered, by him or accepted by the creditor in compromise, settlement, and full payment of the obligation; and surely, unless such fact was found or admitted, there could be no presumption that the payment was so tendered and accepted, but rather the con-

trary. Upon that statement of the case it would appear strange if his Honor had not so instructed the jury. His Honor, in delivering the opinion of the Appellate Court, says: "The question presented is, whether a payment by the debtor and an acceptance by the creditor of a less sum than is due upon a bond, as a payment of the whole, is a discharge of the obligation, so as to preclude the creditor from recovering the remainder of the bond." The difference between the case stated as reported and the statement of the question by his Honor, it will be seen, is essential. Those who have had the acquaintance with that learned justice that it has been my privilege to enjoy will readily conclude that he was correct in his statement of the question presented, and will not, without hesitancy and regret, withhold their assent to the conclusion to which he arrived.

Nor was the question now being considered distinctly presented in the case of *Hays* v. *Davidson* (*ut supra*), for in that case there had been no *acceptance* by the creditor of a less sum than the whole sum due. But it was only averred in the defendant's plea that the plaintiff had agreed with and promised the debtor that he would compromise the claim and take in full settlement a less sum than the whole amount due. The agreement was not one entered into with other creditors of the debtor; there was nothing whatever in this promise which distinguished it from a mere promise without any consideration whatever, either good or valuable. In the opinion of his Honor, so manifestly correct, upon the question there presented, I only cannot concur in the approval given of the opinion in the case of *McKenzie* v. *Culbreth*.

The case of *Bryan* v. *Foy* is not authority for the creditor in this case, for it is not only not alleged that there was any acceptance by the creditor; but, on the contrary, that the creditor refused to accept a sum less than the whole sum then due when tendered. The promise to accept, being *nudum pactum*, could not be enforced. Whether the motive prompting the creditor to refuse to comply with his promise is good or bad, in a moral sense, is not a question for the court. That will not

alter the law applicable to a *promise* void for want of some good or valuable consideration. It is altogether a different principle that will control the conduct of a creditor when he agrees to accept, and does accept (without fraud, by word or in the conduct of the debtor), a less sum than the whole sum due, and then seeks to avoid both his agreement and results of his voluntary act.

It is seen that I do not rely upon any retrospective effect that may be claimed for the act passed by the Legislature of North Carolina, Acts of 1874 and 1875, Chapter 178. Nor, indeed, upon any force that may be attributed to that act. But it will appear by no means clear to the careful reader that the Legislature did not intend by it to alter a well-established principle of the common law, by giving validity to and rendering binding upon a creditor a mere agreement with his debtor, to accept from him any part less than the whole of his debt in compromise, payment, and satisfaction of the debt.

But when a creditor has not only agreed with his debtor to accept (with all his rights to seek and acquire information), but has received from him a less sum in full payment of his debt —and all this without fraud committed by the debtor—that such creditor should be bound by such agreement and acceptance is so manifestly supported by common sense, justice, and reason, that no statute is required to make it the law. It is but a principle of the common law.

The learned counsel for the creditor, in their argument, laid much stress upon the authorities cited. Yet, in the carefully prepared brief filed by them, these cases are not even referred to. But they rest their case almost entirely upon the evidence, which they insist establishes fraud on the part of the agents of the bankrupt corporation, whereby, they say, the creditor was induced to receive the sum paid for the whole debt.

In my view of the testimony no fraud, by word or act, on the part of any agents of the bank, was committed which induced Mrs. Smith to accept the compromise offered; and while it is probably true that if she had correctly anticipated the ultimate results as to the assets of the bank, she would not then

have sought or accepted such a settlement of her claim, the binding force of the settlement does not depend upon ultimate results or the correctness of the judgment exercised by her in that transaction. The fact is that the ultimate ability of the bank to pay a larger proportion, and, finally, to some creditors who "held off," the principal of their debts, was entirely due to compromises accepted by other creditors, as this was by Mrs. Smith—the results of suits against and in favor of the bank then pending, and collections about which, at the time of this settlement of this claim, no human foresight could be regarded as infallible. No understanding of the condition of the bank, however thorough, could enable any officer to say with reasonable certainty the proportion it would be able to pay. Nor would any desire to be truthful and correct on the part of these officers have exempted them from liability to err in any opinion they expressed.

This claim is disallowed, and the register is directed to certify this order to the assignee.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

DECEMBER 6, 1878.

**The bankrupt was adjudicated upon creditors' petition. A petition was subsequently filed by the bankrupt and his assignee, alleging that at the time of the filing of the creditors' petition the bankrupt was a member of a firm which had debts exceeding three hundred dollars, and that it had assets to be administered, and prayed that the other members might be brought in and the firm adjudicated. *Held*, that the relief asked was not so obviously beyond the power of the court to grant that the petition should be summarily dismissed.**

## *In re JAMES E. KELLEY.*

THE facts appear fully in the opinion.

*Philo Chase*, for petitioners.
*G. A. Seixas*, for Barnum.

In re Kelley.

CHOATE, J.—This is a petition filed by Kelley, the bankrupt, and his assignee, alleging that at the time of the filing of the creditors' petition upon which he was adjudicated bankrupt he was a member of a firm of Barnum & Co., consisting of the bankrupt and one Barnum; that said firm was then insolvent; that it then had and still has debts exceeding three hundred dollars; and that there then were and still are firm assets to be administered; that the adjudication of the firm and of Barnum is necessary to the administering of the estate of Kelley in this court, and that Kelley cannot obtain any discharge unless Barnum and the firm shall be brought in; and the petition prays that Barnum and the firm of Barnum & Co. be adjudicated bankrupt in this proceeding.

An order to show cause having issued against Barnum, he appeared and filed certain objections to the jurisdiction; and it is urged on his behalf that a copartner and a firm can be adjudicated only on the voluntary petition of all the partners, or on the petition of one or more of them against those who refuse to join, or upon the petition of one-fourth in number and one-third in amount of the firm creditors, alleging an act of bankruptcy; that the proceedings for the adjudication of Barnum and Barnum & Co. can be only in conformity with General Order No. 18, and that to bring Barnum into this proceeding involves the absurdity of amending the creditors' petition by turning it into a petition of the firm creditors, since upon such a petition alone Barnum and the firm could have been actually adjudicated in this proceeding; that the proper and only proper course for Kelley to have taken when he found that he was proceeded against by his creditors, if he wished to obtain a discharge, was to file an original petition against Barnum for the adjudication of the firm, and then obtain a stay of the other case; that this mode of proceeding is irregular and not authorized by the statute or by the General Orders.

It is true that this mode of proceeding for the adjudication of a firm is not apparently contemplated by General Order No. 18; but in *In re* Greenfield, No. 212, in this court, in which a voluntary petition was filed by Greenfield in August, 1867,

after the adjudication and the appointment of an assignee and the discharge of the bankrupt, a petition was filed by the assignee showing that at the time of the filing of the petition Greenfield was a member of a firm then having debts exceeding three hundred dollars and assets, which firm debts had been set forth in his schedules, and that the firm was then and still was insolvent, and praying that the copartner and the firm be brought in and adjudicated bankrupt in that proceeding; and upon that petition and the default of the copartner an adjudication passed against the copartner and the firm. It was held to be the duty of the assignee, as the representative of the creditors of Greenfield, being unable in any other way to obtain full control of the estate of the bankrupt, thus to bring in the other partner and the firm. (*In re* Greenfield, 5 Ben., 552.) In the case of *In re* Grady (3 N. B. R., 227) a similar ruling was made after argument and careful examination of the question by the District Judge of South Carolina. These cases do not appear to have been questioned in any later authorities; and while the relief given is not expressly authorized by the statute, and is not contemplated in the General Order, it was in furtherance of justice, and is based on the theory that the bringing in of the copartner is necessary to the complete administration of the estate of the bankrupt in the manner provided for in the statute itself.

In the present case the bankrupt himself joins in the petition. He has an interest independent of that which the assignee has as the representative of the creditors; for, without bringing in the copartner, he cannot get the discharge which it was clearly the intention of the act that every adjudicated bankrupt, except in the cases and for the causes for which it is withheld, should be permitted to apply for and receive.

The two decisions are precedents, therefore, for entertaining this petition, unless the fact that the present proceedings were commenced by a creditors' petition is sufficient to distinguish it from those cases.

It was insisted that to bring in the copartner in this proceeding is, in effect, to allow an amendment of these proceed-

ings from the commencement, to make it what it must have been to have brought the firm in originally upon a creditors' petition, that is to say the case of a petition by one-fourth in number and one-third in amount of the firm creditors, alleging the insolvency of the firm and an act of bankruptcy of the firm. If the relief implies that absurdity, of course it is impossible. It is evident, however, that it does not. There is no need to amend or change the original petition in this case. When the adjudication passes upon a creditors' petition, the petitioning creditors cease to be parties to the cause. From that point the case becomes the case of the bankrupt. He and his creditors are the only parties before the court, and so far as the relief now sought is concerned it seems to be immaterial how he got into bankruptcy. The power of the court over his estate is the same whether he was adjudicated on his own or on his creditors' petition. The nature of the preliminary proceeding affects his right to a discharge, or the conditions on which he can have a discharge, but so far as regards the power of the court to grant this relief there seems to be no greater difficulty in the one case than in the other.

If it be conceded that this relief should not be granted for the purpose or with the effect of bringing in a copartner against his will, in any case except in a case authorized by Rev. Stat., Section 5121, that is "on the petition of such partners or of any one of them, or on the petition of any creditor of the partners," yet, in the present case it may be said that this section will be substantially as well as literally complied with if Barnum is brought in on the petition of Kelley, his copartner, although, in the cases above referred to, the copartner was brought in only upon the petition of his and his creditors' legal representative. There was a difficulty of an apparent departure from the statute in those cases which does not apply to this.

The fact that the General Order No. 18 does not provide for such a case seems not decisive on the question of the jurisdiction. Section 5121 provides that in all other respects except as provided in that section, "the proceedings against

partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone." In conformity with this requirement the general orders provide for the case of a copartner objecting to being adjudged bankrupt, and gives such refusing partner the same opportunity to deny and contest the fact of insolvency as in the case of an individual.

Where, however, one of the partners is the petitioner, no act of bankruptcy need be alleged or proved, the only issue being whether the insolvency exists, and whether the facts as to the amount of the firm debts and the residence or place of business of the partners is such as to bring the case within the jurisdiction of the court. The objection made here, therefore, that no act of bankruptcy is alleged seems not to be tenable, since the adjudication is asked on the petition of a copartner.

Nor does the fact of a prior refusal of the copartner to join seem to be made by the statute a jurisdictional fact which it is necessary to prove.

The questions raised on the preliminary objections are important and difficult. But, without passing finally on them, an order will be entered that the respondent put in an answer to the petition.

He may, in his answer, plead to the jurisdiction, and he may be able to state other facts which, if proved, will defeat the petition, and upon petition, answer, and proofs, all the questions raised can be fully discussed and considered. All that is determined now is, that the relief asked is not so obviously beyond the power of the court to grant that the petition should be summarily dismissed.

## UNITED STATES DISTRICT COURT—VERMONT.

APRIL 5, 1879.

The court does not follow the property of the estates of bankrupts into the hands of purchasers, but only to their hands. After they have once had the property, they must take care of it and of the possession of it.

The bankrupt occupied the premises in question until conveyance thereof was made by the assignee to the purchaser. After the purchaser had per-

fected title he had an interview with the bankrupt, in which it was agreed that the latter should vacate on a subsequent specified day. This he did not do. On petition by the assignee for delivery of possession to the purchaser, *Held*, That the bankrupt was holding as a tenant under the purchaser and not under the assignee; that the assignee had no further interest there, and was not further bound to maintain the purchaser's possession for him nor to keep possession ready for him.

## *In re CHARLES F. HALE.*

THE facts appear fully in the opinion.

WHEELER, J.—The petition of the assignee for delivery of possession of the real estate to the purchaser has been referred to the Register, and heard upon his report.

The facts reported show no ground for any action of this court. Regularly, possession of the estate, real and personal, should have been taken by the marshal by virtue of the warrant issued upon the adjudication of bankruptcy, and passed to the assignee upon the assignment of the estate to him, and to the purchaser from the assignee upon the conveyance from the assignee to him. Whether possession was taken of any part of this farm by the marshal or by the assignee does not appear; nor does it appear why possession of the part the bankrupt continues to occupy, whether the whole or a part, was not taken. It merely is shown that the bankrupt continued to occupy until the conveyance from the assignee to the purchaser, in some way, with the consent of, or without apparent objection by, the assignee.

If, then, whatever the terms of his occupancy were, he had refused to deliver up possession or to vacate the premises, unquestionably under the provisions of Section 5104, Revised Statutes U. S., this court could require the delivery up or vacation by order, and punish as for a contempt on any failure to comply. Probably it was in that view that the assignee commenced this proceeding. But the report shows that after the purchaser had perfected his title, in an interview between him and the bankrupt, it was agreed that the bankrupt should vacate the premises by the 15th day of March then next, now just past. This directly implies that it was agreed that the

bankrupt might occupy till that time. The agreement to vacate would necessarily include an agreement for occupation until he should vacate. After that arrangement the bankrupt was occupying under the purchaser, and not under the assignee. The assignee had no further interest there. He was not further bound to maintain the purchaser's possession, nor to keep possession ready for him. He undertook that the purchaser should have good title, but that would extend to the rightful, not the wrongful, claims of others. This possession of the bankrupt is wrongful, not rightful, since the time when he agreed with the purchaser to quit. This court does not follow the property of estates of bankrupts into the hands of purchasers, but only to the hands of purchasers. After they have once had the property they must take care of it, and of the possession of it. This purchaser has had this property once and the possession of it, by having the bankrupt in possession of it under him.

For aught that appears, and upon what does appear, the bankrupt was his tenant to March 15th, and since then has been holding over after the expiration of his tenancy. The laws of the State afford him the same remedies that are afforded other citizens in such cases, and which are ample, or as ample as the law-making power of the State has seen fit to provide for in such cases.

The petition is dismissed, but without prejudice.

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UNITED STATES DISTRICT COURT—INDIANA.

**An unopposed petition for discharge is to be submitted upon the state of case that exists on the return day. If a discharge is subsequently granted upon the assent of creditors, it must be upon the assent of such creditors as have proved their debts on or before the return day.**

## *In re CONRAD SEAMAN.*

GRESHAM, J.—In this case the usual petition and affidavit for discharge were filed, and the 25th day of April, 1879, was

appointed for the creditors to appear and show cause why the prayer of the petition should not be granted. On the day thus appointed the assets of the bankrupt did not equal thirty per cent. of the proven debts; no assent of any portion of the creditors to his discharge was then filed, and the court suspended its action upon the petition in order to afford the bankrupt further opportunity to procure and file the assent aforesaid.

Subsequently the bankrupt asks leave to file proofs of debt by other creditors, with their assent to his discharge, making the assent of one-fourth in number and one-third in value of all creditors who have proved their debts, and it is for the court to determine whether this leave shall be granted.

Section 5,112 of the bankrupt law requires that the assent to discharge shall be filed at or before the hearing of the petition therefor, which is the return-day of the show-cause order, unless further proceedings are necessary; and the general orders of the Supreme Court (No. 24) provide that any creditor who wishes to oppose the petition for discharge must "enter his appearance in opposition thereto on the day when the creditors are required to show cause."

The law does not explicitly designate the precise time when the status of the estate in bankruptcy shall be considered in determining whether the bankrupt is entitled to a discharge; it does not say just when the assets shall equal a certain proportion of the debts, or just when the assent of a certain proportion of the creditors shall entitle him to a discharge.

But it is plain that under the rule no opposition to the discharge can be made unless an appearance for the purpose of making it is entered on the return-day, and no appearance can be entered unless it is by a creditor who has proved his debt on or before that day.

If this be true, it would be unfair to permit the subsequent appearance and proof by creditors for the purpose of aiding the bankrupt in getting a discharge, when the strict language of the rule denies the right of subsequent appearance and proof by creditors for the purpose of resisting it.

If on the return day the record shows that the bankrupt is

not entitled to a discharge by reason of a deficiency of assets, or the failure or refusal of enough creditors to assent thereto, the creditors are not apt to enter their appearance in opposition to the petition, for it would be unnecessary to oppose what is denied by the record, and cannot be granted without their consent.

And if the status of the case, as it exists on that day, may be afterward modified by the admission of other creditors who favor the discharge, it would seem proper that all the creditors should be again notified, and have another opportunity to show cause, and so on *ad infinitum*.

The proceeding of the bankrupt for discharge is one instituted by himself; the creditors who have proved their debts are made parties, and the bankrupt's right to the relief asked by him in cases where there is no appearance in opposition thereto, depends upon the showing he is able to make on the day that the creditors are required to respond in his petition.

He can select his own time, under the limitations imposed by the statute, for filing his petition, and if he is not able on the return-day of the order that is made thereon, and in default of any opposition thereto, to show that he is entitled to the relief that he asks, he ought not to be permitted to come in afterward and obtain it without further notice, and upon an entirely different showing.

If a discharge is subsequently granted upon the assent of creditors, it must be upon the assent of such creditors as have proved their debts on or before the return day.

It seems to be the meaning of the law and rules that an unopposed petition for discharge is to be submitted upon the state of case that exists on the return day, and the leave to file the assent of creditors who have proved their debts since that time is accordingly refused.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

APRIL 22, 1879.

A creditor seeking to vacate an adjudication must make his application with due diligence on being informed of the facts, and even slight want of diligence is in such case imputed as laches and forfeits his claim to the aid of the court.

From the time creditors first receive notice of an adjudication they are put upon inquiry as to any matters in which it may affect their interests and which can be readily discovered by them, and if they make no inquiries and do nothing, it is evidence of acquiescence on their part.

In June, 1878, the bankrupt was adjudicated by consent in involuntary proceedings. In March, 1879, a petition was filed by a creditor who had recovered judgment and had a receiver appointed before the filing of the said petition in bankruptcy to vacate the adjudication on the ground of fraud and collusion; that the paper, suspension of which was alleged as the act of bankruptcy, was not made or passed in the bankrupt's business as a trader; that the petitioning creditors swore to the petition without knowing its statements to be true; that the greater part of their claims were fictitious, and that they did not constitute the requisite number and amount. It appeared that the petitioner did not prove her claim, but that she combined with other creditors and contributed money to pay the expenses of a re-examination of the proof of debt by one of the petitioning creditors, and that she had been admitted to and did oppose an application of the bankrupt for a discharge. *Held*, That her actions in the proceeding estopped her from any claim of right to make this application; that she was guilty of laches, especially so as she waited until after the repeal of the Bankrupt Law, and thereby prevented the bankrupt from going into voluntary bankruptcy.

In August, 1878, she had prepared a petition, but abandoned it because she had not then sufficient proof of the facts. *Held*, That this did not excuse the delay; that she should have made immediate application, and, if necessary, should have applied for such examination of the parties and such taking of testimony as was necessary for eliciting the truth.

## *In re ABRAHAM MEADE.*

THE facts appear fully in the opinion.

*Coleridge E. Hart*, for petitioner.
*Wheeler H. Peckham* and *P. W. Ostrander, contra.*

CHOATE, J.—This is an application of a creditor of the bankrupt to set aside the adjudication. On the 19th of June, 1878, a petition was filed against the bankrupt signed by six persons alleging themselves to be at least one-fourth in number and one-third in value of all the creditors of Meade, and al-

leging as an act of bankruptcy, the suspension for forty days of his commercial paper, made in his business as a trader, and praying that he be adjudicated a bankrupt. On the return-day of the order to show cause, June 29, 1878, Meade appeared, and upon his filing a written consent thereto he was adjudicated a bankrupt.

This application to vacate the adjudication is made upon the petition of Elizabeth L. Hart, a creditor of said bankrupt, who recovered a judgment against him in March, 1878, for two thousand and eighty-six dollars. The petition now presented was filed March 12, 1879. The grounds upon which this relief is sought are fraud and collusion between the bankrupt and the petitioning creditors in procuring the adjudication; that the bankrupt was not in fact a trader; that the paper, the suspension of the payment of which constituted the alleged act of bankruptcy, was not made or passed in the course of his business *as a trader;* that the petitioning creditors, and especially three of them, swore to the petition without knowing that Meade was a merchant or trader within the meaning of the Bankrupt Law; that the greater part of the alleged claims of the petitioning creditors were fictitious, and that they did not constitute in fact one-third in value of the creditors of said Meade; and especially that the said claim of James C. Meade, one of the petitioning creditors, whose claim is stated at thirty-four thousand dollars, and constituted about one-third of the aggregate claims of the petitioning creditors, and which was necessary to make up the one-third in value of all the debts, was wholly fictitious; that the petition was prepared and filed collusively and fraudulently between the bankrupt and the petitioning creditors, who were relatives and friends of his family, to obtain a discharge without paying any part of his debts, and with intent on the bankrupt's part to defraud the petitioner, Mrs. Hart, of the result of her diligence in obtaining a judgment and an appointment of a receiver of Meade's property, which had been obtained in proceedings supplementary to her judgment the day before the petition in bankruptcy was filed; that the bankrupt knew that he had not committed an

as to whether the modal requirements of the law have been complied with. 301

*In re* Isaac Friedberg.

The fact that the bankrupt failed to keep proper books of account in a business which has been entirely closed out, there being no debts due to nor owing by him arising out of such business, will not prevent a discharge.

Nor will a discharge be prevented by the fact that he failed to keep proper books of account in his business prior to the passage of the Bankrupt Act. 302

*In re* Cavan & Sheldon.

Mere delay in obtaining the requisite number of signatures to a composition, unaccompanied by laches, will not justify a refusal to record the composition.

A resolution proposing a composition of seventy cents, to be paid within thirty days after recording the resolution, upon condition that all the property of the bankrupts be surrendered to them, and all pending suits discontinued, is not improper. 303

*In re* Henry Kitzinger et al.

An appeal having been taken from an order allowing to a creditor interest upon his unpaid dividend at the rate of seven per cent. from the time said dividend was payable, the creditor procured an order directing the trustee to deposit in a trust company the amount of such dividend, interest and costs, to abide the result of the appeal. This was accordingly done, and the order having been affirmed on the appeal, *Held*, That the deposit of the moneys was not a setting aside of certain moneys as constituting the creditor's dividend, but was merely a change of investment by the trustee for the greater security of the creditor; that there was no waiver of the latter's right to full interest; that he was not confined to the rate of interest which the deposit earned, but was entitled to the full rate of interest from the day the dividend became payable to the day it is paid. 307

*In re* Bonnett et al.

One of the members of a committee appointed under Sec. 5103, rendered services to the trustee, at his request, in preparing for market and putting in condition to be sold, a large stock of tobacco, and also in effecting the settlement of an important litigation affecting the estate. On an application for compensation, *Held*, That the services were not such as the trustee could call on the committee to perform in the ordinary course of their duty; that it was inconsistent with the statute that they should be employed by the trustee to act in any other capacity for a compensation, and that the claimant was not entitled to compensation. 309

*In re* John D. Brown.

The limitation contained in Section 5120, in relation to proceedings to annul a discharge, is absolute, and the time begins to run from the date of the discharge, and not from the discovery of the fraud. 312

*In re* Bank of North Carolina. Foy *v.* Dewey, Assignee, &c.

Where a creditor has not only agreed with his debtor to accept (with all his rights to seek and acquire information), but has received from him a less sum in full payment of his debt, without fraud committed by the debtor, such creditor is bound by such agreement and acceptance, and the binding force of the settlement does not depend upon ultimate results or the correctness of the judgment exercised by the creditor in that transaction.

One A. deposited certain moneys with the bankrupt's branch at Newbern, which was afterwards discontinued. In 1866 the bankrupt, not being able to redeem its circulation and pay other creditors in full on demand, made a public offer of twenty-five per cent. in gold or its equivalent. The agent of the branch bank, who was a personal friend of A., received from her a check for the full amount of her deposit, and paid her the dividend thereon at the rate of twenty-five per cent. in gold, and she expressed herself as satisfied with the arrangement. The check was entered on the teller's journal and A.'s account balanced, but it was not entered on the deposit ledger from which the schedule in bankruptcy was made out, and the amount deposited by A. appeared on such schedule as a debt due. It appeared that, after the settlement with A., other creditors were paid

larger dividends, and that some were paid in full. On proof by A.'s administratrix, the entire amount of deposits was allowed. On re-examination, *Held*, That the payment to A. was offered and accepted as a compromise and full settlement of her claim against the bank; that no fraud by word or act on the part of the bank or its agents was committed which induced A. to accept the compromise; and that such settlement was valid and binding. 314

*In re* James M. Kelley.

The bankrupt was adjudicated upon creditors' petition. A petition was subsequently filed by the bankrupt and his assignee, alleging that at the time of the filing of the creditors' petition the bankrupt was a member of a firm which had debts exceeding three hundred dollars, and that it had assets to be administered, and prayed that the other members might be brought in and the firm adjudicated. *Held*, that the relief asked was not so obviously beyond the power of the court to grant that the petition should be summarily dismissed. 326

*In re* Charles F. Hale.

The court does not follow the property of the estates of bankrupts into the hands of purchasers, but only to their hands. After they have once had the property, they must take care of it and of the possession of it.

The bankrupt occupied the premises in question until conveyance thereof was made by the assignee to the purchaser. After the purchaser had perfected title he had an interview with the bankrupt, in which it was agreed that the latter should vacate on a subsequent specified day. This he did not do. On petition by the assignee for delivery of possession to the purchaser, *Held*, That the bankrupt was holding as a tenant under the purchaser and not under the assignee; that the assignee had no further interest there, and was not further bound to maintain the purchaser's possession for him nor to keep possession ready for him. 330

*In re* Conrad Seaman.

An unopposed petition for discharge is to be submitted upon the state of case that exists on the return day. If a discharge is subsequently granted upon the assent of creditors, it must be upon the assent of such creditors as have proved their debts on or before the return day. 332

*In re* Abraham Meade.

A creditor seeking to vacate an adjudication must make his application with due diligence on being informed of the facts, and even slight want of diligence is in such case imputed as laches and forfeits his claim to the aid of the court.

From the time creditors first receive notice of an adjudication they are put upon inquiry as to any matters in which it may affect their interests and which can be readily discovered by them, and if they make no inquiries and do nothing, it is evidence of acquiescence on their part.

In June, 1878, the bankrupt was adjudicated by consent in involuntary proceedings. In March, 1879, a petition was filed by a creditor who had recovered judgment and had a receiver appointed before the filing of the said petition in bankruptcy to vacate the adjudication on the ground of fraud and collusion; that the paper, suspension of which was alleged as the act of bankruptcy, was not made or passed in the bankrupt's business as a trader; that the petitioning creditors swore to the petition without knowing its statements to be true; that the greater part of their claims were fictitious, and that they did not constitute the requisite number and amount. It appeared that the petitioner did not prove her claim, but that she combined with other creditors and contributed money to pay the expenses of a re-examination of the proof of debt by one of the petitioning creditors, and that she had been admitted to and did oppose an application of the bankrupt for a discharge. *Held*, That her actions in the proceeding estopped her from any claim of right to make this application; that she was guilty of laches, especially so as she waited until after the repeal of the Bankrupt Law, and thereby prevented the bankrupt from going into voluntary bankruptcy.

In August, 1878, she had prepared a petition, but abandoned it because she had not then sufficient proof of the facts. *Held*, That this did not excuse the delay; that she should have made immediate application, and, if necessary, should have applied for such examination of the parties and such taking of testimony as was necessary for eliciting the truth. 335

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# SYNOPSIS OF CASES, No. 8.

*In re* Parker & Morris.

The note of a third person, given and received in payment of the debt of another, is a valid contract, and operates to extinguish and discharge the original debt; and a note given by a partner in payment of a debt of the firm, as to such debt, is the note of a third person.

To constitute an absolute payment of a pre-existing debt by a promissory note, there must be an agreement to receive it as such, and the burden of proof is upon the party alleging the fact.

The creditor of an insolvent firm, with knowledge of such insolvency, procured P., a member of the firm, to make his promissory note, secured by a mortgage upon his individual property, in payment of the firm debt: *Held*, 1. That such payment was an unlawful preference over the other creditors of the firm, and therefore invalid. 2. That the mortgage was an unlawful preference over the creditors of P., and also the creditors of the firm, and therefore invalid. 3. That the creditor could only prove his debt against the estate of the firm, and then only for a moiety thereof.

The actual fraud on the part of a creditor receiving a preference contrary to Section 39 of the Bankrupt Act, as amended by Section 12 of the Act of June 22, 1874 (18 Stat., 180), which will prevent him from proving his debt for more than a moiety thereof, is something more than the passive receipt of payment from an insolvent debtor with reason to believe him insolvent, but the creditor must be an actor in the fraud —must do something to induce or coerce his debtor to make him a payment under circumstances constituting it an unlawful preference. 340

Stewart *v.* Platt, Assignee, etc.

Under the New York statute a chattel mortgage by a firm upon firm property is void as against creditors, subsequent purchasers, and mortgagees in good faith, unless filed in the towns or cities where the individual members of the firm respectively reside. It is not sufficient to file in the town or city where the partners conduct the firm business. But such mortgages are good as between the parties without being filed.

A bankrupt caused a conveyance of real estate to be made to his wife several years before the commencement of proceedings in bankruptcy. It was a gift from him at a time when he had the right to make it. Within the four months preceding the bankruptcy, the wife and husband conveyed to a creditor of the latter, and the consideration was credited on the debt held by the grantee against the husband. *Held*, That the assignee in bankruptcy could not complain of such transaction, and the property was not subject to the general debts of the bankrupt.

Within four months preceding bankruptcy, the lessor of a hotel, holding, as security for rent, sundry chattel mortgages, from the bankrupts, upon the personal property in the hotel, which mortgages were good as between the parties, although void under the statute against creditors, accepted real estate at a fair valuation, in payment of a part of the back rent, and thereby extinguished his lien upon the mortgaged property. By the terms of the mortgage, the lessor, at the time, could have taken the mortgaged property into his custody and sold it for rent. *Held*, That, as the arrangement was made in good faith, without any intention to defraud or to give preference to the lessor, the transaction should be regarded as, in substance and effect, an exchange of securities. 347

*In re* Sidney F. Shelbourne.

The bankrupt, in 1869, executed a note for ten thousand dollars, payable, in three years, to one C., for the purpose of settling an account between them. It was indorsed by C., and left in his possession. A disagreement

act of bankruptcy when he consented to the adjudication and permitted the court to be misled by the false averments of the petition.

Notice of this application having been given to the bankrupt and the petitioning creditors, and also to all known creditors of the bankrupt, the petitioning creditors and the bankrupt appeared and answered, denying the alleged frauds and false statements, and some of the other creditors appeared and offered no objection to the vacating of the adjudication; other creditors did not appear.

By the papers accompanying this petition, and on which, together with the petition, this application is made, it appears that the petitioner procured the appointment of a receiver of the property of the bankrupt by a State court in proceedings supplementary to her execution, and he gave bond and was duly qualified as such receiver, June 18, 1878; but that no assets have come to his hands, and that the receivership secures but a small part, if any, of her debt; that the petitioner, Mrs. Hart, has never proved her debt; that at the first meeting of creditors, held July 19, 1878, objection was made by other creditors to the proof of James C. Meade's claim, and he was not allowed to take part in the election of an assignee; that a re-examination of his claim was demanded, and has been ever since proceeding before the register; that though this petitioner did not prove her claim, because she believed that her receivership gave her security on the debtor's property, yet that she entered into a combination with other creditors to defeat in the bankruptcy proceedings the claim of James C. Meade as fictitious, contributing the money to pay the expenses of this re-examination of James C. Meade's proof of debt; that an application by the bankrupt for his discharge has been opposed by this same combination of creditors, including the petitioner, who has obtained a special order of the court permitting her to appear therein and file specifications. These proceedings have involved very protracted examinations, at a large expense to the parties interested; that in August, 1878, this petitioner prepared a petition similar to her present peti-

tion, asking the setting aside of the adjudication on substantially the same grounds as are now urged, but abandoned it because she was advised that she had not at that time sufficient proof of the facts alleged to proceed with it successfully.

The bankrupt and the petitioning creditors insist that the petition should be dismissed, on the ground that upon her own petition and accompanying papers she is not entitled to relief. This motion must be granted. The power of the court to vacate its own decree, which has been procured by fraud and deceit, either upon the motion of any party interested in having it set aside, or on its own motion when the facts are properly brought to its attention, cannot be doubted. But the power is one to be exercised cautiously, with a due regard to the interests of all parties who may be injuriously affected thereby, and especially to the rights and interests of any parties who may have relied on the decree as valid and be injuriously affected by its being vacated. In other words, the application is one made to the sound discretion of the court under all the circumstances. (*In re* Court, 17 N. B. R., 555; *In re* Griffith, 18 N. B. R., 510; *In re* Funkenstein, 14 N. B. R., 213, and cases cited; *In re* Lalor, 19 N. B. R., 253.)

As regards the parties who may apply for such relief, it must appear that they have made the application with diligence on being informed of the facts; and even slight want of diligence is in such a case imputed as laches, and forfeits their claim to the aid of the court. Such delay is regarded as virtual acquiescence in the decree, so far as it affects them. (Same cases; also *In re* Thomas, 11 N. B. R., 330; *In re* Neilson, 7 N. B. R., 505.) In this case the petitioner has, through the co-operation and under the names of other creditors who personally appeared, actively taken the benefit of the decree now sought to be set aside, and also more recently in her own name endeavored, by proceedings in the due course of the Bankrupt Law, to obtain relief only attainable under and by virtue of the decree of adjudication as a valid judgment. This clearly estops her from any claim of right to make this application. It also appears clearly that early in August,

1878, she was fully aware of all the facts now relied on as the ground of this application. It was clearly incumbent on her, if she intended ever to proceed to set aside the adjudication, to make immediate application to the court, and if not yet in possession of all the evidence essential to her case, she should have applied to the court for such examination of the parties and such taking of testimony as was necessary for eliciting the truth. Instead of this, she has in fact proceeded under the adjudication for relief wholly inconsistent with the vacating of the decree.

Clearly no case is made which calls on the court of its own motion to vacate the decree. If erroneous, it has been acquiesced in by creditors by their inaction and failure seasonably to move to set it aside. Even their ignorance of the facts at this late day could not excuse their inaction, for, from the time creditors first receive notice of an adjudication, they are put upon inquiry as to any matters in which it may affect their interests, and which can readily be discovered by them, and if they make no inquiries and do nothing, it is evidence of acquiescence on their part. In this case, the decree has been made the basis of long and expensive litigation, all of which will be utterly without result if the decree shall be vacated. This renders it improper to disturb the decree, if originally procured by false suggestion. As to one of the principal grounds on which it is attacked—the alleged fictitious nature of the claims of the petitioning creditors—this petitioner and all other creditors have also full and adequate relief without vacating the decree, because if this fact is proved it bars the bankrupt's discharge, since he must have known the fact and did not disclose it.

As to the other ground, that there was in fact no act of bankruptcy, the alleged bankrupt not being a "trader" within the meaning of the Bankrupt Law, the suggestion on behalf of the bankrupt is, I think, entitled to great weight: that if at any time before the repeal of the Bankrupt Law, September 1, 1878, this application had been made, he could have gone into voluntary bankruptcy, and that the petitioner, though knowing

or having ample means to ascertain the fact, has waited till it is too late for him to take the benefit of the Bankrupt Law at all. The same suggestion is properly made also in respect to those of the petitioning creditors who are not directly charged with fraud, but only with carelessly joining in a petition, not *knowing* that its averments were true. It is observable that the petition does not allege that they did not *believe* that this averment of the act of bankruptcy was true, or that they *knew* that it was *false;* and however such carelessness is to be censured, it seems to me that the petitioning creditors, who presumably had an interest in the adjudication of their debtor under the Bankrupt Law, have not forfeited thereby all title to consideration, and as to them and their interests this petitioner has been guilty of gross laches in not moving before the repeal of the Bankrupt Law.

I have gone thus at length into the reasons for dismissing this petition, not because I have entertained any doubt on the question, but because of the great diligence and earnestness with which the case of the petitioner has been presented to the court by the petitioner's counsel.

Petition dismissed.

## UNITED STATES DISTRICT COURT—OREGON.

### FEBRUARY, 1880.

The note of a third person, given and received in payment of the debt of another, is a valid contract, and operates to extinguish and discharge the original debt; and a note given by a partner in payment of a debt of the firm, as to such debt, is the note of a third person.

To constitute an absolute payment of a pre-existing debt by a promissory note, there must be an agreement to receive it as such, and the burden of proof is upon the party alleging the fact.

The creditor of an insolvent firm, with knowledge of such insolvency, procured P., a member of the firm, to make his promissory note, secured by a mortgage upon his individual property, in payment of the firm debt: *Held*, 1. That such payment was an unlawful preference over the other creditors of the firm, and therefore invalid. 2. That the mortgage was an unlawful preference over the creditors of P., and also the creditors of the firm, and therefore invalid. 3. That the creditor could only prove

his debt against the estate of the firm, and then only for a moiety thereof.

The actual fraud on the part of a creditor receiving a preference contrary to Section 39 of the Bankrupt Act, as amended by Section 12 of the Act of June 22, 1874 (18 Stat., 180), which will prevent him from proving his debt for more than a moiety thereof, is something more than the passive receipt of payment from an insolvent debtor with reason to believe him insolvent, but the creditor must be an actor in the fraud —must do something to induce or coerce his debtor to make him a payment under circumstances constituting it an unlawful preference.

## *In re PARKER & MORRIS.*

THE facts appear fully in the opinion.

*Henry Ach*, for the assignee.
*William Strong*, for the creditor.

DEADY, J.—Robert A. Irvine proved a debt upon a promissory note of two thousand five hundred and forty-four dollars and sixty-two cents, against the individual estate of Allen Parker, a member of the bankrupt firm of Parker & Morris. The assignee objected to the proof, that the claimant, at the time of taking the note from Parker, received a preference contrary to the provisions of the Bankrupt Act. The claimant answered denying the allegation, and averring that he had surrendered the security and proved his debt as an unsecured one.

From the evidence taken before the register it appears that Allen and John Parker and A. B. Morris, in the early part of 1877, and some years prior thereto, were partners engaged in the warehouse business and dealing in wheat at Albany. Irvine stored wheat with them until the amount reached about eight thousand bushels, which the firm purchased in December, 1876, or January, 1877, at one dollar a bushel "on short time."

The firm and the individual members thereof were then insolvent and had been so for some time.

In the latter part of February, John Parker and Morris transferred the business and warehouse to Allen, he to pay the debts of the firm as far and as fast as the assets would allow. About February 20, 1877, Irvine was informed of the transfer

to Allen Parker and assented to it, prior to which time he had been paid the sum due him by the firm, less two thousand four hundred and eighty-six dollars and sixty cents.

On March 26, 1877, Irvine, being aware of the insolvency of the firm and that of the members thereof, demanded of Parker payment of the balance due him or security therefor—stating "*that the company was not able to pay its debts*," but that if Parker would give him his note, secured by a mortgage upon his farm, he would wait a year for the money. Parker, being unable to pay the debt, gave Irvine his note for the same, payable in one year thereafter with interest at one per centum per month, secured by a mortgage upon his farm of two hundred and forty-seven acres in Linn County, and certain lots in the town of Albany, valued in the inventory in the aggregate at seven thousand five hundred dollars.

After this—in the latter part of May—an attempt to compromise with the creditors of the firm having failed, Morris proposed to put the firm into bankruptcy, and Irvine endeavored to dissuade him from so doing until the limitation upon the inquiry as to the validity of his mortgage—four months from the date thereof—had expired, but Morris refused, saying that all the creditors must share alike, and filed his petition on June 5, following, upon which the firm and the individuals thereof were duly adjudged bankrupts.

Upon the hearing before the register the matter was certified here for decision.

Upon the argument the point was made that the note of Parker being given in payment of the firm debt—a debt for which he was already liable—is invalid for want of consideration.

The authorities are not uniform upon this question, but the weight of them, as well as reason and considerations of convenience and utility, favor the rule that the note of a *third* person given and received in payment of the debt of another is a valid contract and operates to extinguish or discharge the original debt; and that a note given by a partner for a debt of the firm is, as to such debt, the note of a *third* person.

In *Sheehy* v. *Mandeville* (2 Cr., 15), Ch. J. Marshall said: "This principle appears to be well settled. The note of one of the parties, or of a third person, may, by agreement, be received in payment. The doctrine of *nudum pactum* does not apply to such a case, for a man may, if such be his will, discharge his debtor without any consideration. But if it did apply, there may be inducements to take a note from one partner liquidating and evidencing a claim on a firm which might be a sufficient consideration for discharging the firm. (See also *In re* Ouimette, 3 N. B. R., 566, 1 Saw., 47; *Cumber* v. *Wane*, and notes thereof, in 1 Smith's L. Cas., 549.)

But to constitute an absolute payment of a pre-existing debt by a promissory note there must be an agreement to receive it as such, and the burden of proof is upon the party alleging the fact.

In *Harris* v. *Lindsay* (4 Wash. C. C., 270), Mr. Justice Washington held that when there was an agreement between partners that one of them should retain the partnership effects and pay the debts, "that no indulgence granted by a creditor to the paying partner, which falls short of an agreement, express or implied, to take him as the debtor, and to discharge the other partner," can have the effect to discharge the retiring partner.

The note being valid as the note of a third person received in payment of the debt of the firm, what effect has the Bankrupt Act upon the transaction? The giving of the note merely, while it increased the liabilities of Allen Parker and by the so much diminished his ability to pay his individual creditors in full, did not, it seems to me, constitute a *preference*, as against such creditors.

The mere creation or acknowledgment of a debt does not create a preference. A debt contracted by an insolvent person is entitled to payment out of his estate, the same as if he was solvent. Nothing less than payment or a pledge to secure payment amounts to a preference. By means of the note Parker became indebted to Irvine, but the latter was not thereby preferred over the other individual creditors of the former.

Such creditors have a right to question the validity of this debt because its allowance diminishes the fund to which they have a right to look for the satisfaction of their claims. But the note being valid—given upon a sufficient consideration—the claim as an unsecured one is good as against the individual creditors of Parker.

But is it so as against the creditors of the firm? The Bankrupt Act (Section 36; 21 R. S., § 51,) provides that the joint estate of a partnership shall be first applied to the payment of the creditors of the partnership and the separate estate of each partner to the payment of his separate creditors, and if there is any balance of either of said estates, after satisfying the claims of the creditors first entitled to be paid thereout, it shall be added to the other estate for the benefit of the creditors thereof.

Under this rule, if Parker's separate estate was more than sufficient to pay his individual creditors, excluding the claim of Irvine's, the balance would be added to the joint estate for the benefit of the joint creditors. But if this debt is allowed against the separate estate of Parker it must be paid in full before any portion of such estate can be applied upon the debts of the firm. For illustration, suppose that the separate estate is just sufficient to pay the individual debts of Parker, including the claim of Irvine, and that the joint estate is only sufficient to pay the firm creditors twenty-five cents on the dollar—Irvine, by taking the note of Parker in payment of his claim upon the firm has obtained a material preference over the other creditors of the firm, whose claims are quite as meritorious as his. By this means, if allowed, he secures the payment of his claim in full out of the surplus of the separate estate which rightfully belongs to the creditors of the joint estate.

But in fact the difference between the value of the joint and separate estates, compared with the debts proved against them, is greater than supposed.

The estates have all been reduced to cash, and neither of the partners, except Allen Parker, appears to have had any separate estate. According to a report of the register, made

on the 14th inst., the debts proved against the joint estate amount to eighteen thousand four hundred and nineteen dollars and twenty-six cents, and against the separate estate of Parker, including Irvine's claim, seven thousand five hundred and eighty-three dollars and twenty-five cents; and the assets of the joint estate are eight hundred and forty-nine dollars and nineteen cents, and of the separate estate five thousand nine hundred and forty-nine dollars and sixty-five cents. Upon this basis the register estimates the dividends payable to the creditors from the joint estate at four per centum, and the separate estate at seventy-five per centum.

But if the sum of three thousand four hundred and twenty dollars, the proceeds of the sale of the warehouse, which is claimed to be partnership property, is transferred from the separate to the joint estate, the former will then pay a dividend of thirty per centum and the latter one of twenty-two, but even upon this basis, with the Irvine claim proved against the joint estate, it will only pay nineteen per centum while the separate one will pay forty-five per centum.

Tested by the Bankrupt Act, the spirit and purpose of which is to prevent one creditor of an insolvent getting the advantage of another, this is clearly an unjust transaction, and although no case has been found exactly in point, I am satisfied that it constitutes an unlawful preference, and is therefore invalid.

But it is claimed on behalf of Irvine that there was an absolute agreement to take Parker for the debt and discharge the firm at the time the property and business was turned over to Parker, and that the note subsequently given by him to Irvine was merely given in satisfaction of the obligation thus incurred by Parker to Irvine; and that at the date of this agreement Irvine had no reason to believe the firm was insolvent. For the sake of the argument it may be admitted that Irvine had no knowledge of the insolvency at this time. But the evidence does not satisfy my mind that there ever was any absolute agreement on the part of Parker to pay this debt until he gave his note for the same. Prior to that time there was

doubtless an understanding that Parker was to pay the claim, but it was as well understood and expected that he was to make such payment as and for the firm and from its assets only.

And this is evident from what Irvine said to Parker, as an excuse for demanding payment of his claim—either in money or the individual note and mortgage of the latter—"that the company was not able to pay its debts." If, as is claimed, Irvine already had Parker's individual obligation to pay the debt, why give as a reason for exacting the note and mortgage of Parker, that the *company* was not able to pay its debts? Because, up to that time he had looked to the firm as his debtor and expected Parker to pay him as the agent of the firm and out of its assets, and not otherwise.

This proof of debt, as against the separate estate of Parker, must be rejected and the creditor allowed to prove his original claim against the joint estate, as though this note had not been given, unless he has forfeited his right to prove for more than a moiety thereof by reason of taking this preference.

Section 39 of the Bankrupt Act, as amended by Section 12 of the Act of June 22, 1874 (18 Stat., 180), provides that a person receiving a payment or conveyance from an insolvent contrary thereto, shall be liable for the same to the assignee; and such person, if a creditor, shall not, in cases of *actual fraud* on his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of *voluntary* as well as involuntary bankruptcy."

The *fraud* here intended means something more, I suppose, than the passive receipt of payment from an insolvent debtor, with reason to believe him insolvent.

In my judgment a creditor is not guilty of actual fraud within the meaning of this Section unless he does something to induce or coerce his insolvent debtor to make him a payment under circumstances constituting it an unlawful preference.

A creditor who obtains payment by this means with rea-

sonable cause to believe his debtor insolvent is guilty of actual fraud and can only prove for a moiety of his debt.

Irvine's case falls clearly within this category. Virtually, he constrained Parker to give him his individual note in payment of a firm debt, and for the reason given by himself at the time, that the firm was insolvent—unable to pay its debts.

Viewed in this light the transaction constituted an unlawful preference and a fraud upon the act, which Irvine, with full knowledge of the facts, actively participated in.

But even assuming that the note of March 26th was given, not in payment of the firm debt, but in satisfaction of a prior absolute agreement by Parker to pay such debt, yet the taking of the mortgage to secure it was an unlawful preference and a fraud upon the act as against the individual creditors of Parker, and therefore if this claim were otherwise a valid one against his separate estate, it could only be proved for a moiety thereof. The demanding and taking the mortgage, under the circumstances, constituted the actual fraud on the creditor's part, and the subsequent waiver of the security by proving the debt as an unsecured one when it was manifest that the mortgage could not be enforced, does not condone or excuse it. The statute is peremptory, and declares that such a creditor "shall not be allowed to prove for more than a moiety of his debt."

The taking of such security was also an unlawful preference as against the creditors of the firm, because in effect it was an appropriation of so much of the separate estate of Parker to the payment of Irvine's debt, to the prejudice and wrong of the other creditors of the firm, to whom any surplus of such estate after payment of his individual debts justly belonged.

## UNITED STATES SUPREME COURT.

### OCTOBER TERM, 1879.

**Under the New York statute a chattel mortgage by a firm upon firm property is void as against creditors, subsequent purchasers, and mortgagees in good faith, unless filed in the towns or cities where the individual members of the firm respectively reside. It is not sufficient to file in the town or**

city where the partners conduct the firm business. But such mortgages are good as between the parties without being filed.

A bankrupt caused a conveyance of real estate to be made to his wife several years before the commencement of proceedings in bankruptcy. It was a gift from him at a time when he had the right to make it. Within the four months preceding the bankruptcy, the wife and husband conveyed to a creditor of the latter, and the consideration was credited on the debt held by the grantee against the husband. *Held*, That the assignee in bankruptcy could not complain of such transaction, and the property was not subject to the general debts of the bankrupt.

Within four months preceding bankruptcy, the lessor of a hotel, holding, as security for rent, sundry chattel mortgages, from the bankrupts, upon the personal property in the hotel, which mortgages were good as between the parties, although void under the statute against creditors, accepted real estate at a fair valuation, in payment of a part of the back rent, and thereby extinguished his lien upon the mortgaged property. By the terms of the mortgage, the lessor, at the time, could have taken the mortgaged property into his custody and sold it for rent. *Held*, That, as the arrangement was made in good faith, without any intention to defraud or to give preference to the lessor, the transaction should be regarded as, in substance and effect, an exchange of securities.

## *CORNELIA M. STEWART* v. *JOHN H. PLATT, Assignee, &c., of SIMEON LELAND et al.*

THE facts appear fully in the opinion.

HARLAN, J.—This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, in a suit instituted by the assignee in bankruptcy of Simeon Leland, Warren Leland, and Charles Leland, late partners under the name of Simeon Leland & Co. The latter were adjudged bankrupts upon the petition of one of their creditors filed on March 24, 1871.

The objects of the suit, so far as they concern the appellants, were—

1. To obtain the distribution of a fund arising from the sale of furniture and other personal property in use in the Metropolitan Hotel in the city of New York, at the commencement of the proceedings in bankruptcy. The Lelands were lessees of that hotel under a written lease from A. T. Stewart, dated April 30, 1867, for a term of four years thereafter, at an annual rent of seventy-nine thousand one hundred and eighty-six dollars, payable in equal monthly instalments. Upon the property thus sold Stewart held, as security for

rent reserved by the lease, several chattel mortgages executed by the Lelands, the validity of which was questioned, in this suit, by the assignee in bankruptcy.

2. To have a decree declaring sundry judgments against the bankrupts within four months prior to the adjudication in bankruptcy, as well as certain conveyances of real estate to Stewart, to be invalid under the provisions of the Bankrupt Law, and as against the assignee.

The first question to which we will direct our attention relates to those several chattel mortgages.

The District and Circuit Courts concurred in opinion that they were not filed in the office designated by the statutes of New York, and, upon that ground, were ineffectual to give the security and lien contemplated by the parties, and void as against the assignee.

By the laws of New York it is provided that every mortgage or conveyance, intended to operate as a mortgage of goods and chattels, which should not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, should be absolutely void, as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed as directed in the act. The statute requires such mortgages to be filed in the town or city where the mortgagor, "if a resident of that State, shall *reside* at the time of the execution thereof; and if not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution of such instrument." In the city of New York, the mortgage is directed to be filed in the office of the register of said city; in other cities of the State, and in the several towns thereof in which a county clerk's office is kept, in such office; and, in each of the other towns of the State, in the office of the town clerk thereof. Registers and clerks are required to file such instruments, presented to them for that purpose, and endorse thereon the time of receiving same, and keep them deposited in their offices, for the inspection of the persons interested.

It is further provided that every mortgage filed in pursuance of the statute should cease to be valid against the creditors of the mortgagor, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of each and every term of one year after the filing of the mortgage, a true copy thereof, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him in virtue thereof, shall be again filed in the office of the clerk or register aforesaid, of the town or city where the mortgagor shall then *reside*.

The bankrupts resided with their families in the county of Westchester, at the respective dates of the several chattel mortgages, but the business of the firm of Simeon Leland & Co., as lessees of the Metropolitan Hotel, was carried on in the city of New York, and all the property covered by the mortgages was in use in that hotel. The mortgages were filed in the office of the register of deeds for the city and county of New York, and were not filed in the towns where the lessees, respectively, resided with their families. The contention of learned counsel for the appellants is that *the firm* was the mortgagor, that *its* residence or domicile was in the city of New York, and that the manifest object of the statute was met by filing the several mortgages in the city where the firm carried on its business. The question thus presented is within a very narrow compass, and is not free from difficulty. Its solution depends upon the meaning of the word "reside" employed in the statute. It is to be regretted that we are not guided by some direct controlling adjudication in the courts of New York construing the statute under examination. But no such decision has been brought to our attention. With some hesitation we have reached the conclusion that a chattel mortgage, executed by a firm upon firm property, is void, under the New York statute, as against creditors, subsequent purchasers, and mortgagees in good faith, unless filed in the city or town where the individual members of the firm severally reside. The statute, upon its face, furnishes persuasive evi-

dence that its framers intended to make a sharp distinction between the place where the property might be at the time of the execution of the mortgage, and the place of the mortgagor's residence. If he be a non-resident of the State of New York, the mortgage may be filed in the town or city where the property shall be at the time of the execution of the mortgage. If he be a resident, then his residence, not the actual *situs* of the property, governs. If these instruments be executed by several resident mortgagors, the statute would seem to require that the mortgage be filed in the towns or cities where the mortgagors, at the time, respectively reside.

Some stress is laid upon the fact that, in each of the mortgages, the mortgagors are described as "of the city of New York." If that is to be regarded as a representation by them that their fixed abode was in that city, it is obvious that the statute designed for the protection of creditors, subsequent purchasers and mortgagees in good faith, cannot be thus defeated. Their rights depend not upon recitals or representations of the mortgagors as to their residence, but upon the fact of such residence. The actual residence controls the place of filing, otherwise the object of the statute would be frustrated by the mere act of the parties to the injury of those whose rights were intended to be protected. The recital of the residence in the mortgage "seems to be of no importance, and might, for the matter of security, be omitted altogether." (Nelson, C. J., in *Chandler* v. *Bunn*, Hill & Denio, Sup., 169.)

A good deal was said in oral argument as to the serious inconveniences which may result from any construction of the statute that requires chattel mortgages, executed by a firm, upon its property, to be filed elsewhere than in the town or city where the property is used, and where the firm business is conducted. On the other hand, it is quite easy to suggest reasons, of a cogent character, why, in view of the manifest purpose of such legislation, the actual residence of the mortgagors should determine the place of filing. But these are considerations to be addressed more properly to the legislature of New York, with whom rests the power to make such

alterations as experience may suggest to be necessary. The statute expressly declares that a chattel mortgage, not filed as required by its provisions, is void as to creditors and subsequent purchasers and mortgagees in good faith; and the circuit justice well said that the statute had "imposed a rigid and unbending condition, to wit, a filing in the place where the mortgagors actually reside, as a preliminary to the validity of the mortgage. Whether this condition is wise or not, whether convenient or difficult of performance, is not for the courts to say. The statute exacts it, and the courts must see that it is performed." Upon this branch of the case, therefore, we concur in opinion with the Circuit Court.

It follows, necessarily, from what has been said, that the Circuit Court rightly adjudged that creditors who obtained judgments and sued out executions against the Lelands, previous to the commencement of bankruptcy proceedings, had prior claims and liens upon the proceeds arising from the sale of the property covered by the chattel mortgages.

But the final decree in the Circuit Court is erroneous in directing the residue of the proceeds of the sale of the mortgage property, after satisfying execution creditors, "to be paid to the assignee [in bankruptcy] for the purpose of the trust," and in charging that balance with the payment of the fees due counsel of the assignee.

In *Yeatman* v. *Savings Institution* (17 N. B. R., 187, 95 U. S., 764) we held it to be an established rule that, "except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. (*Brown* v. *Heathcote*, 1 Atk., 160; *Mitchell* v. *Winslow*, 2 Story, 630; *Gibson* v. *Warden*, 14 Wall., 244; *Cook* v. *Tullis*, 9 N. B. R., 433, 18 Wall., 332; *Donaldson, Assignee*, v. *Farwell*, 15 N. B. R., 277,

93 U. S., 631; *Jerome* v. *McCarter*, 15 N. B. R., 546, 94 U. S., 739.) He takes the property in the same "plight and condition" that the bankrupt held it. (*Winsor* v. *McLellan*, 2 Story, 492.)

The decree below is plainly in contravention of this rule. Although the chattel mortgages, by reason of the failure to file them in the proper place, were void as against judgment creditors, they were valid and effective as between the mortgagors and the mortgagee. (*Lane* v. *Lutz*, 1 Keyes, 203; *Westcott* v. *Gunn*, 4 Duer, 107; *Smith* v. *Acker*, 23 Wend., 653.) Suppose the mortgagors had not been adjudged bankrupts, and there had been no creditors, subsequent purchasers, or mortgagees in good faith to complain, as they alone might, of the failure to file the mortgages in the towns where the mortgagors respectively reside. It could not be doubted that Stewart, in that event, could have enforced a lien upon the mortgaged property in satisfaction of his claim for rent. The assignee took the property subject to such equities, liens, or incumbrances as would have affected it had no adjudication in bankruptcy been made. While the rights of creditors, whose executions preceded the bankruptcy, were properly adjudged to be superior to any which passed to the assignee by operation of law, the balance of the fund, after satisfying those creditors, belonged to the mortgagee, and not to the assignee for the purposes of his trust. The latter representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagors. The assignee can assert, in behalf of the general creditors, no claim to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee. As between the mortgagors and the mortgagees, the chattel mortgages were and are unimpeachable for fraud, or upon any other ground recognized in the Bankrupt Law.

It results that the court below erred in directing the fees of the assignee's counsel to be paid out of the residue of the fund in court remaining after the claims of execution credi-

tors were satisfied. To that balance the appellants are entitled without diminution, to be applied in payment of the rent remaining unpaid, after crediting thereon forty-three thousand five hundred dollars, the agreed valuation of the real estate conveyed to Stewart, and to which we will presently refer in another connection. It was error to charge that balance with the payment of costs or fees of counsel, or any expense incurred by the assignee in bankruptcy in the administration of his trust.

We come now to the questions relating to the several conveyances of real estate made to Stewart in January and February, 1871; all of which were adjudged by the Circuit Court to be void as against the assignee in bankruptcy.

It is important to consider the circumstances under which those conveyances were made. Early in the month of January, 1871, commenced a series of interviews between the lessees and Stewart, brought about, perhaps, by the demand of the latter, through his agent, for the settlement of rent in arrear, which then amounted to about fifty thousand dollars. The lessees desired a new lease at a reduced rent, while Stewart insisted upon the payment, or a satisfactory arrangement, of the rent due him. The former confessed present inability to discharge the indebtedness in any other mode than by conveyances of real estate, which they urged the latter to take at fair valuation and give a new lease at reduced rent. The lessees, in those interviews, expressed the utmost confidence that such an arrangement would relieve them from all immediate financial burdens, growing out of the hotel business, and enable them to meet promptly thereafter not only instalments of rent, but all other engagements. Stewart finally agreed, for the accommodation of his lessees, to accept certain real estate, offered to him at the aggregate price of forty-three thousand five hundred dollars, in satisfaction of a like amount of back rent, and, necessarily, in extinguishment to that extent of his mortgages upon the furniture and other property in the hotel building. He also signified his willingness to renew the lease to the same parties, at the reduced rent of sixty-five thousand dollars.

In pursuance of this arrangement the lessees, or some of them, caused conveyances to be made to Stewart of the real estate in question, consisting of a farm in Westchester County, and several houses and lots in Crosby, Jersey, and Prince Streets, in New York City.

We are all of opinion that the conveyance, dated February 1, 1871, by Mrs. Warren Leland and her husband, of the farm in Westchester County, was unassailable by the assignee upon any ground whatever. That property was a gift from the husband to the wife at a time when his right to make it cannot be disputed. As early as 1863 it was distinctly separated from the mass of his property, and the title made to her for her benefit. There is no proof that the conveyance was with any intention to defraud his then existing or future creditors. Of those whose interests the assignee in bankruptcy here represents, or assumes to represent, none, except perhaps one, were creditors of Warren Leland at the date of that conveyance. The bill alleges that the bankrupts, or some of them, intended to give Stewart a preference over other creditors, and to that end, it is charged, Warren Leland caused the conveyance to be made to his wife of the farm in question, "owned by the said Warren Leland, but standing in the name of his wife." But clearly it was not owned by the husband after the execution of the absolute conveyance of 1868. Her rights, by reason of anything appearing in this record, could not be disturbed by the husband's creditors who became such after the execution of the conveyance to her. She chose, in order to aid her husband, or for other reasons satisfactory to herself, to unite with him in the conveyance to Stewart, thereby surrendering her estate for the benefit of the husband's creditors. Suppose she had not so done, and that the title had remained in her name up to the time of the adjudication in bankruptcy. Would it be contended for a moment, that the assignee in bankruptcy, or that the creditors of the bankrupts, becoming such after the execution of the conveyance, could have subjected that farm to the debts of Warren Leland against the consent of his wife? This question must, in view of the evi-

dence, receive a negative answer, which shows, conclusively, that the appropriation of the wife's property, by the joint act of herself and husband, to the payment of the debt of a particular creditor of the latter, is not a matter of which the assignee in bankruptcy or any subsequent creditor of the husband can rightfully complain. The decree of the Circuit Court declaring the conveyance of that farm to Stewart to be void, and requiring Mrs. Stewart to convey to the assignee in bankruptcy, was, for the reasons stated, clearly erroneous.

It remains to consider that part of the decree which declared the conveyance to Stewart of the houses and lots on Crosby, Jersey, and Prince Streets, in New York City, to be void.

When those conveyances were agreed to be made, Stewart, as already stated, had an undisputed claim for rent in arrear, amounting to over fifty thousand dollars. Under the provisions of the mortgages, a default in the payment of rent having taken place, Stewart, at the time the exchange was determined upon, could have taken actual possession of the mortgaged property and sold it for the best price he could obtain in satisfaction of his claim for rent. His right to possession for such a purpose could not have been questioned by any creditor of the lessees who had not, by previous judgment and execution, acquired a lien upon the mortgaged property. (2 Denio, 171; 6 Duer, 99; 35 N. Y., 277; 7 Cowen, 292; 9 Wend., 83, 84; 12 Ibid., 62.) Instead of exercising that right—a course which would have seriously endangered, if it had not utterly destroyed, the business and credit of the lessees—Stewart, at their earnest solicitation, and for their accommodation, accepted real estate at a fair valuation in satisfaction of rent due and unpaid, thereby surrendering and extinguishing his lien to that extent upon the property described in the chattel mortgages. Of the forty-three thousand five hundred dollars at which the real estate received by Stewart was valued, nineteen thousand five hundred dollars represented the farm in Westchester County, which we have shown could not have been subjected to the claim of any creditors who became such after the conveyance to Mrs. Leland. In point of fact, therefore, only twenty-

four thousand dollars in value of real estate, belonging to the bankrupts, was received by Stewart, while he surrendered his claim and lien for rent to the extent of forty-three thousand five hundred dollars. This was, in its substance and effect, a mere exchange of securities, not forbidden by the letter or the spirit of the Bankrupt Law. In *Cook* v. *Tullis* (18 Wall., 340), we said that "a fair exchange of values may be made at any time, even if one of the parties to the transaction be insolvent. There is nothing in the Bankrupt Act, either in its language or object, which prevents an insolvent from dealing with his property, selling it or exchanging it for other property, at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leave his estate in as good plight and condition as previously." Substantially the same doctrine was announced in *Clark* v. *Iselin* (11 N. B. R., 337, 21 Wall., 360) and *Sawyer* v. *Turpin* (13 N. B. R., 271, 91 U. S., 114).

These principles would seem to be decisive of the case under consideration. While there is some conflict in the testimony as to certain matters, we have a strong conviction, from all the facts and circumstances established by the proof, that the transaction by which the real estate, at a fair valuation, was substituted for the lien, of like amount, upon personal property, was without any fraudulent purpose. The substitution was not made to give preference to Stewart. The belief and hope of the bankrupts, expressed in decided terms to him, were that the substitution or exchange would enable them to remove all financial obstacles of a serious nature. They induced him, by earnest representation, to share these hopes. He delayed or forbore the exercise of the right, which, at the commencement of negotiations he undoubtedly had, of taking

the mortgaged property into his custody, and disposing of it in satisfaction of his claim for rent. That the arrangement in question did not substantially impair the value of the bankrupts' estate is abundantly clear. His lien, which was extinguished by the exchange, exceeded, in value, that portion of the real estate embraced in the conveyance to him which the creditors of the bankrupts could have reached under their executions. Reference is made to the fact that the mortgaged property brought only forty-three thousand four hundred and sixty-nine dollars and thirty-one cents, and that circumstance is relied upon to show that the exchange did impair the estate of the bankrupts. This argument proceeds upon the assumption either that when the exchange was determined upon, he had not a lien upon the mortgaged property, as between him and the mortgagors, or that if he had one, he would not have enforced it by taking the property into his custody, upon a refusal of the lessees to make some satisfactory arrangement. But such assumption is without support in the law or in the proof. Besides, the evidence leads to the conclusion that the mortgage property sold, at public auction, for less than its fair value. While the witness who made the inventory and appraisement, testifies that it sold for its full value, the auctioneer, who conducted the sale, testified that with proper appliances it would have brought fifty per cent. more. It is certain that it sold for much less than either the lessees or Stewart, at the time of their negotiations, supposed it was worth.

For these reasons we are of opinion that the court below erred in adjudging the conveyances to Stewart of the houses and lots on Crosby, Jersey, and Prince Streets, in New York, to be void, requiring Mrs. Stewart to convey the same to the assignee in bankruptcy, and declaring his estate liable for the rents and profits of same.

The decree below is reversed, with directions to enter a decree in conformity with this opinion.

FIELD, J.—I concur in the decree of reversal in this case, but I go further than the majority of the court. I think that

the chattel mortgages were properly filed with the register in the city of New York. The mortgagors were partners doing business there. They are described in the mortgages as of that city. The property mortgaged was furniture in a hotel situated there, and it is to the records of the city that one would naturally resort to ascertain whether there were any liens upon it. The domicile of a firm, under the law requiring chattel mortgages to be filed in the county where the mortgagors reside, is, in my judgment, the place where it is located and carries on its business. I am of opinion, therefore, that the chattel mortgages in this case held the property against the judgments of the creditors, and I am authorized to say that Mr. Justice Swayne and Mr. Justice Bradley agree with me in this view.

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## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

### NOVEMBER 26, 1879.

**The bankrupt, in 1869, executed a note for ten thousand dollars, payable, in three years, to one C., for the purpose of settling an account between them. It was indorsed by C., and left in his possession. A disagreement arose, however, about the items of the settlement, and no final agreement was made as to the disposition to be made of the note. One T. purchased the note before maturity, and without notice of any equities between the maker and payee, for one thousand five hundred dollars. All the parties were citizens and residents of the State of New York. In an action on the note in the State Court, T. recovered a judgment for the whole amount of the note, which judgment was reversed on appeal and a new trial granted, unless plaintiff should consent to reduce the judgment to the amount paid by him and interest. On proof of claim, *Held*, That the judgment of the appellate court was not a conclusive determination of the rights of the parties in this proceeding; that the note having been negotiated in the State of New York, and all parties being residents thereof, the rights of the claimant are controlled by the law of that State, and that in accordance with the decisions of that State, the claimant is only entitled to prove for the amount paid by him with interest.**

## *In re SIDNEY F. SHELBOURNE.*

THE facts appear fully in the opinion.

*F. G. Salmon*, for opposing creditors.
*Jas. G. Thompson*, for petitioner.

In re Shelbourne.

CHOATE, J.—The question in this case is whether the holder of a promissory note made by the bankrupt is entitled to prove for the whole amount of the note or only for the sum he paid for the same, with interest. The facts are agreed upon as follows: The bankrupt was adjudicated upon his own petition, which was filed August 28, 1878. The claimant, Henry B. Todd, made proof upon a promissory note signed by the bankrupt, dated October 26, 1869, whereby he promised to pay, three years after date, to James Cummings, or order, ten thousand dollars for value received. This note was made for the purpose of settling an account between Cummings, the payee, and the bankrupt. It was indorsed by Cummings and left in his possession. Cummings and the bankrupt, however, disagreed about the items of the settlement, and no final agreement was made between them as to the disposition to be made of the note. In October, 1872, Cummings sold the note to the claimant Todd for one thousand five hundred dollars. At the time of the purchase, Todd supposed, from an examination of the books of Cummings, that the bankrupt owed Cummings an amount exceeding the amount of the note. Todd purchased the note without any notice of the transaction between Cummings and the bankrupt as to the delivery of the note. The bankrupt, Todd and Cummings were at the time the note was made and have ever since been all citizens and residents of the State of New York. In October, 1872, Todd brought an action on the note in the Supreme Court of the State of New York against the bankrupt, and after a hearing upon the merits the court rendered a judgment in said action against the bankrupt for the whole amount of the note and interest with costs. The bankrupt appealed from said judgment to the General Term of the said court, and the General Term reversed the judgment and ordered a new trial, unless the plaintiff (Todd) should consent to reduce the judgment to one thousand five hundred dollars and interest. Neither party has appealed from the order of the General Term, nor has the consent to reduce the judgment been given, and the action is still pending in said court awaiting trial. All of

these proceedings were prior to the filing of the petition in bankruptcy.

On these agreed facts it must be held that the claimant Todd took the note before maturity for value without notice of any equities between the maker and the payee; that as between the maker and the payee there was no consideration, and the payee indorsed the note to Todd in violation of the terms of the agreement on which he held it, and that he held it without any authority to negotiate it.

Two questions have been discussed, 1st, whether the decision of the General Term of the Supreme Court is conclusive in this proceeding against the creditor's right to recover more than the amount paid for the note and interest, and if not, 2dly, for what amount the creditor should be allowed to prove. 1. The proceedings in the State Court are not a conclusive determination of the rights of the parties. There is no judgment that can be pleaded as an estoppel of record. The judgment that was entered has been reversed, and is of no new effect, and no new judgment has ever been entered. There is simply a suit pending between the parties undetermined. It is true that the court in which it is pending has expressed a very decided opinion as to the rule of law by which the rights of the parties are to be determined, and, doubtless, *in that suit*, the question argued and passed upon would be deemed no longer an open question of law, unless the case should reach the Court of Appeals; but in any other court that determination would only have the weight and consideration to which the reasoning of the judges rendering the decision seems to entitle it. It certainly would not be conclusively binding on any other court of concurrent jurisdiction to which the same case might be presented. If the claimant Todd should discontinue his suit in the Supreme Court, or become nonsuited, and afterward commence another action on the note in another State Court, and the same facts precisely should be shown in the second suit as in that now pending, the decision in the Supreme Court would not conclude him, if the court in which he afterward sued should come to a different conclusion on the same question of law. (See *Wood*

v. *Jackson*, 8 Wend., 9; *Delaunay* v. *Burnett*, 4 Gilm., 454, 497.)

2. It is, therefore, open to this creditor to claim the whole amount of the note, if entitled thereto.

There is, I think, no doubt that according to the authoritative decisions of the courts of New York, this creditor, Todd, can recover in the courts of this State only the amount he paid for the note, and interest on the same from the time of the purchase. The principle of these decisions is that while as against the maker of the note, who has apparently put it in the power of the payee to represent the note to be a valid promissory note, the holder of the note, who took it in good faith for value before maturity, is entitled to an indemnity on the ground of an estoppel *in pais*, yet in reality the note is invalid, and not in fact commercial paper, and the holder does not become vested with the rights of such *bona fide* holder of commercial paper according to the law merchant. It was so held in this creditor's own suit in the State Court, and the ruling there made is abundantly supported as the law in this State by the authorities cited in the opinion of the General Term. (*Todd* v. *Shelbourne*, 8 Hun, 510.) The basis of the decision is that the paper sued never became a promissory note at all, never having been delivered as such to the payee; but the maker having carelessly entrusted the possession of it with the payee, under circumstances calculated to lead a purchaser to believe that the payee had authority to negotiate it, the loss caused to the purchaser by reliance on this deceptive appearance of authority must fall, not on the innocent purchaser, but on the maker, who himself created the deceptive appearance. And, as in all other cases of estoppel *in pais*, the amount that can be recovered by the party deceived is the loss he has suffered, and no more, as the court say in that case.

"The paper derives its vitality wholly from the circumstance that it has been obtained for value without notice by an innocent purchaser. For his protection it is maintained in his hands as a legal obligation. The object of the law is to save him from loss; and to do that, a recovery of the amount he

may have advanced is all that can be required. To go beyond it would be inequitable and unjust to the party after that equally entitled to be protected from unnecessary loss." As here expressed, the idea seems to be that a partial or *quasi* validity, for the purpose of and up to the extent of an indemnity, is by a species of legal fiction, and to prevent injustice, given to the note. And in accordance with this idea the mode of pleading allowed is as upon a promissory note and not specially upon the case; and this mode of pleading is proper and logical on the theory of an estoppel, because the very meaning of an estoppel is, that the party estopped is prevented from denying the truth of the fact represented by him to be true, which in this case is, that the paper is a promissory note duly delivered, as its purport and the possession of the payee clearly indicate. But the rigor of this estoppel, or inability to deny the fact, is mitigated so far that for all purposes of recovery beyond the loss sustained by reliance on the representation the estoppel ceases, and the party estopped may show the truth. The true ground of the decision, therefore, is an estoppel, and neither the form of pleading allowed nor the expression in the decision to the effect that the paper has validity as a legal obligation for the protection of the innocent purchaser, are inconsistent with this view.

It is insisted, however, that the true rule of the commercial law is that the purchaser for value before maturity of what purports on the face to be commercial paper, without notice of any want of authority of the payee to negotiate it, becomes vested with the title thereto unaffected by any equities existing between the maker and the payee; that the note, by its negotiation, becomes by the law merchant a valid obligation of the maker to its full extent, and not merely a *quasi* or limited obligation by way of estoppel, even though the note has been put in the possession of the payee by the maker without authority to negotiate it. It is argued that unless this is so, the security of the purchaser of commercial paper, which is very greatly favored and protected in the interests of commerce, is greatly impaired. And it is further insisted that this

is the rule of commercial law as declared by the Supreme Court of the United States; that by the rule so declared this creditor is entitled not to an indemnity only, but is fully vested with the rights of a *bona fide* indorsee for value before maturity, and entitled to recover the whole amount of the note and interest; that this court is bound in this case to administer the law as held by the Supreme Court of the United States and not the local law of New York.

It is not to be denied that in passing upon the rights of a *bona fide* holder for value before maturity of what is on its face commercial paper, the Supreme Court of the United States has differed from the courts of New York and many other States, and has, in the interest of commerce, as understood and declared in its decisions, held more rigidly to the general principle which is admitted by all courts, of excluding, by way of defence, the equities existing between the prior parties (*Goodman* v. *Simonds*, 20 How., 343; *Brown* v. *Spofford*, 95 U. S., 474); and in favor of a party who, under the Constitution and the Laws of the United States, is entitled to relief in the courts of the United States, that is to say, aliens and citizens of a State other than that of which a party sued is a citizen, and who in the particular case is not bound by the local law under which the other party seeks to defend, the Courts of the United States administer the law as declared by the Supreme Court, even though in conflict with the law of the defendant's State. (*Gelpcke* v. *Dubuque*, 1 Wall., 175; *Butz* v. *City of Muscatine*, 8 id., 575; *Township of Pine Grove* v. *Talcott*, 19 id., 666; *National Bank of Republic* v. *Railroad Co.*, 14 Blatch., 242.)

Whether the particular question involved in this case in respect to the right to show the invalidity of the note in the hands of the payee for the purpose of limiting the recovery to the amount paid and interest has been determined by the Supreme Court of the United States, has been discussed in the present case. Most of the decisions touching the subject have been cases where the holder paid full value, and this precise question could not arise in such cases. This is true of the case

chiefly relied on by the learned counsel for this claimant. (*Cromwell* v. *County of Sac*, 96 U. S., 51.) But I have not found it necessary to determine this question because it seems to me that however that may be, the rights of the claimant as the purchaser of this paper are controlled by the law of New York. The note was made and sold to this claimant in the State of New York, and the question whether or not the purchaser took the title of a *bona fide* indorser for value before maturity must be determined by the local law. In *Trimbey* v. *Vignier* (1 Bing. N. C., 151), it was held that where by the law of France the indorsement in blank of a promissory note gave the indorsee no right to sue on it in his own name, but only the right to sue for it in the name and as the agent of the indorser, the indorsee could not sue on it in his own name in England. The court say, "The interpretation of the contract must be governed by the law of the country where the contract was made; the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought." And they held that the rule of the local law by which an indorsement in blank does not operate as a transfer of the note was "a rule which regulates the interpretation of the contract," and not "the mode of instituting and conducting the suit." So where by the law of the State where a note was indorsed, the indorser was not liable until after judgment had been obtained against the maker, it was held that without the recovery of such judgment he could not be held as indorser in another State, on the ground that this was not a matter affecting the remedy merely, but a condition of liability which was part of the contract itself. (*Williams* v. *Wade*, 1 Metc., 82.) The parties must be held to have had reference to the law of New York where the note was indorsed and delivered to the purchaser as regards the determination of the rights created by that indorsement and transfer. (*Aymar* v. *Sheldon*, 12 Wend., 439.)

This rule, that the law of the place where a contract is made governs in respect to its validity and interpretation, is recognized and applied by the Supreme Court of the United States

in the case of commercial paper made and passed within one of the United States. (*Tilden* v. *Blair*, 21 Wall., 241.) In the present case I think it is clear that the rule of the New York courts, which limits the recovery of the purchaser of the note to the amount paid and interest, is not a mere rule affecting the remedy, but is a rule regulating the validity and interpretation of the contract. Those courts in effect hold that in New York the title to the note as a note does not pass, that the note has no validity, and they give the holder damages by way of indemnity only, for the very reason that no title passes.

Ordinarily, I think the rule in bankruptcy must be that a creditor can prove only for that sum which he would be entitled to recover in an action, if there were no bankruptcy, and in this case the claimant Todd could in no way, nor in any court, recover of the bankrupt more than he paid and interest. It is possible, of course, that by reason of a difference in the laws of different States, or of the notes of the bankrupt being sold in different States, purchasers in one State may have very different rights from those in another State. It is possible that another purchaser of a similar note of the bankrupt, for the same price at which this claimant bought this note, might make good his claim to the whole amount, either as a creditor proving in bankruptcy or in a suit in a court of the United States. But this possible inequality between creditors is no greater after bankruptcy than it is independently of bankruptcy, and it rests on a real difference in the rights of the parties as fixed by the different laws of the States in which the negotiation of the paper is made. But I think there is no ground for the claim that the courts of the United States apply as between the citizens of a particular State any other law than the law of that State, as respects the validity and interpretation of contracts made in that State, whether the contract be one arising out of the making or negotiation of what purports to be negotiable paper or anything else. No question is here involved of the rights of citizens of other States, or of the effect of the negotiation of commercial paper in another State, as affecting the rights of the holder acquired thereby or of the

effect of subsequent legislation for judicial interpretation operating as an attempted violation of the obligation of a contract valid when made—questions which arose in some of the cases cited where the courts of the United States have refused to apply the law, as held in local tribunals, to invalidate the title of holders of commercial paper, who are entitled, as citizens of another State or as aliens, to sue in the courts of the United States. (*Gelpcke* v. *Dubuque*, 1 Wall., 175; *Township* v. *Talcott*, 19 id., 666; *Butz* v. *Muscatine*, 8 id., 575.) While in these and other similar decisions it is declared by the Supreme Court that, upon questions of commercial law, the courts of the United States are not bound by the decisions of the courts of the State where the cases arise, yet the cases before the court, in respect to which the rule was so held, were in every instance cases of a "controversy between citizens of different States," or "between citizens of a state and subjects of a foreign state," to which the judicial power of the Federal Courts, by the Constitution, extends. Many of them were cases where the paper had been negotiated out of the State whose local law it was sought to apply. In the leading case of *Swift* v. *Tyson* (16 Pet., 1), where the court refused to follow the settled law of New York, as established by the decisions of the courts, to invalidate the title of an innocent indorser for value of commercial paper on the principle above stated, the plaintiff was a citizen of Maine, suing as indorsee of what purported to be commercial paper, negotiated in Maine, and transferred to the plaintiff there; and there was nothing to show that the law of Maine, where the contract of indorsement was made, was different from the common law upon the point in question. In that case, therefore, and those that have followed the question that arises in the present case, whether the rights of a citizen of New York, claiming under a contract made in New York, is not bound by the law of New York, as declared by its judicial tribunals, and independently of any statute governing the case, did not and could not arise. This distinction between the rights of persons who are entitled to sue in the courts of the United States, and those of parties to a contract,

who are both subject to the law of the same State, is clearly pointed out by the Supreme Court in the case of *Watson* v. *Tarpley* (18 How., 517). In that case the question was whether the statute of a State, forbidding a suit from being brought by the indorsee of a bill, before its maturity, in case of non-acceptance, had any effect on a suit brought in a court of the United States. Mr. Justice Daniel, delivering the opinion of the court, said: "While it will not be denied that the laws of the several States are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction, it is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States, as vested and prescribed by the Constitution and laws of the United States; nor destroy or control the rights of parties litigant, to whom the right of resort to these courts has been secured by the laws and Constitution. This is a position which has been frequently affirmed by this court, and would seem to compel the general assent upon its simple enunciation." "The general commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the Constitution and laws of the United States having conferred upon the citizens of the several States and upon aliens the power or privilege of litigating and enforcing their rights acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must follow, by regular consequence, that any State law or regulation, the effect of which will be to impair the rights thus secured, or to divest the federal courts of cognizance thereof in their fullest acceptation under the commercial law, must be nugatory and unavailing." This decision cites and approves *Swift* v. *Tyson*, which case gave an interpretation of the thirty-fourth Section of the judiciary act, providing that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trusts at common law in the courts of the United States in cases where they apply, "limit-

ing that provision to the local statutes or local usages of a fixed and permanent operation," and holding that on questions of commercial or common law the courts of the United States were not bound to follow the decisions of the local tribunals, and the case of *Watson* v. *Tarpley*, cited above, properly limits this principle to cases of those persons who, under the Constitution of the United States, are secured in the right or privilege of litigating their controversies in the courts of the United States, that is to say, aliens and citizens of different States.

I think, therefore, both upon reason and authority, that the rights of this creditor, are to be determined by the local law, unless the fact that the question arises upon the proof of debt in bankruptcy brings the case within the principle of the decisions above referred to; I think not. It was the purpose of the Bankrupt Law to secure the ratable distribution of the bankrupt's property among his creditor's, not to enlarge or alter the rights of the creditors, but simply to ascertain them, for the purpose of this distribution, as they were at the time of the bankruptcy. This creditor's rights were then fixed and certain. There was no court to which he could resort which would give him more than the amount he paid for the note and interest. This view, drawn from the general purpose of the Bankrupt Law, is confirmed by some of its special provisions. In case of a dispute as to the amount due a creditor, this court may permit a pending suit to go on to judgment for the purpose of determining the amount due. As between citizens of the same State such suit must go on in the State Court. This court could not authorize a suit in such a case in a Federal Court. Undoubtedly the Bankrupt Court may assume the determination of the question itself, but it would be a very singular result if, in determining the amount due to the creditor, it should be found to fix a larger sum than the creditor could recover in the court to which this court is authorized to send him for the same purpose.

The decision of the register, reducing the claim to one thousand five hundred dollars and interest, is affirmed.

UNITED STATES CIRCUIT COURT—E. D. VIRGINIA.

The bankrupt court has summary jurisdiction over all contracts made with itself respecting the bankrupt's property.

Where, on the release of goods under seizure by the marshal, a bond is given for the production of the property or its value, the court may order the property or its value to be brought into court by the parties to the bond.

## *M. ROSENBAUM* v. *E. M. GARNETT, Assignee, &c., of ENGEL & SON.*

PETITION invoking supervisory power of Circuit Court from decree of District Court in bankruptcy.

The facts appear fully in the opinion.

BOND, J.—It appears that in this case the District Court ordered the marshal, on the 17th of June, 1870, to seize the goods of the bankrupt, which were alleged to be in possession of one Lisberger. In obedience to this order the marshal took possession of the bankrupt's effects, including such as were alleged to be in the hands of Lisberger. After this seizure, Lisberger, upon his petition, had the property so seized restored to him by the District Court, which court required him to give a bond conditioned for the production of this property or the value of it, to abide the future order of the court.

Afterward a bill in equity was filed, alleging the fraudulent assignment of these same goods by the bankrupt to Lisberger, to which bill Lisberger was a party, and that suit determined the value of the property in question, and that it was not the property of Lisberger, but was the property of the bankrupt. This case having gone first to the Circuit Court (see 1 Hughes, 620), and then to the Supreme Court on appeal, was affirmed by the Circuit Court, and was dismissed by the Supreme Court for the want of prosecution. *Supersedeas* bonds were given upon the appeals.

It being now determined that the property for which the bond was given to the District Court by Lisberger, in order that what was then in that court's possession might be placed in

his, was not Lisberger's, but the bankrupt's, the District Court passed an order requiring the parties to this bond to bring into court the ascertaincd value of the goods which were released to Lisberger when it was given.

From this order of the District Court, the sureties, or one of them, Rosenbaum, appeals to the supervisory jurisdiction of this court, with what justice we cannot see.

There was no time after the filing of the bond in question till now that the District Court could not, if it feared the safety of goods, have, by its order, required the parties to that bond to bring the released property or its value into court. Lisberger and his sureties on the bond stood in the same relation to the court when put in possession of the property that the marshal did; and it would not be contended that where a marshal was in possession of property by order of the court, the plaintiffs claiming it must sue his bond before they could get them.

This bond was given in a bankrupt case, where the court is authorized, by summary proceedings, to collect the assets of the bankrupt. It is found now that those assets are in the hands of the parties to this bond, and the court may proceed against them precisely as if they had been actually in hand; and, if the value of them is ascertained in a suit in which the principal was a party, and the goods themselves are consumed, as is the case here, the court may require the payment of the ascertained value.

The fact that Lisberger gave a *supersedeas* bond in the suit brought to determine the value and title to the goods, no more releases the obligors in this bond to the court than it would release the sureties on the marshal's bond had he remained in possession or surrendered the goods to Lisberger without the order of the court. The Bankrupt Court has summary jurisdiction over all contracts made with itself respecting the bankrupt's property.

We have heard this petition as one made to the supervisory jurisdiction of the Circuit Court, being of opinion that no appeal lies from the order of the District Court requiring the pe-

titioner to produce in court the value of the goods placed by it in the hands of Lisberger upon his responsibility.

It is not a "case in equity," nor a "suit at law," nor "an order rejecting the claim wholly or partially of a creditor," nor "an order allowing such a claim," mentioned in the section of the Bankruptcy Law granting appeals.

We shall dismiss the petition with costs, and direct the District Court to proceed as it may be advised.

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SUPREME COURT—NEW YORK.

JUNE 30, 1879.

**Where a defendant omits to plead his discharge in bankruptcy, but allows judgment to be recovered against him, such discharge is no defence to an action on the judgment.**

## *The REVERE COPPER CO.* v. *ANTHONY W. DIMOCK.*

THIS action is brought upon a judgment recovered by the plaintiff against the defendant, upon April 1, 1875, in the Superior Court of Massachusetts, for the County of Suffolk. The amount of the judgment is three thousand five hundred and ninety-five dollars and fifteen cents. The defence is, that upon March 26, 1875, the defendant was duly discharged in bankruptcy, and that the indebtedness for which the judgment was recovered accrued prior to the adjudication in bankruptcy, and was provable therein.

Upon the trial plaintiff offered in evidence the Revised Statutes of Massachusetts of 1860 (Chapter 115, Sections 1 and 3), which confer general jurisdiction upon the said Superior Court, and also offered a duly exemplified copy of the judgment record. Defendant offered a certificate of discharge in bankruptcy, granted by the United States District Court for the District of Massachusetts, granted to the defendant upon March 26, 1875. He also offered the schedules in the bankruptcy

proceedings. Plaintiff objected to these offers as immaterial and incompetent, and as not establishing any legal defence to the cause of action proved.

*David J. H. Wilcox*, for the plaintiff.
*George Putnam Smith*, for the defendant.

BARRETT, J.—The Massachusetts court had complete jurisdiction. The parties were regularly before it, and the subject-matter was an ordinary action upon certain promissory notes. The judgment there pronounced is under the circumstances conclusive. (Const., Art. 4, Section 1; *Mills* v. *Duryea*, 7 Cranch, 481; *Hampton* v. *McConnel*, 3 Wheat., 234; *Dobson* v. *Pearce*, 12 N. Y., 156.)

The defendant says in effect that he had a good defence of which he omitted to avail himself. With that we have nothing to do. The court had *jurisdiction*, whether the defendant was discharged or not. It was for the defendant to plead his discharge. He might as well say that the court had no jurisdiction because the notes had been paid and cancelled; or because the plaintiff had executed a release under seal.

The grounds upon which judgments recovered prior to the discharge (on provable claims) are placed in the same situation as the original demand is, that the defendant had no opportunity to plead the discharge. Such was the doctrine of *Clark* v. *Rowling* (3 Comst., 216). In that case, however, Hurlburt, J., referred with approval to the opposite doctrine (as enunciated in *Steward* v. *Green*, 11 Paige, 535) where the judgment follows the discharge. The Chancellor, in *Steward* v. *Green*, intimated that the discharge obtained before the recovery of the judgment could not avail the defendant while such judgment remained in full force, and that he ought to have pleaded such discharge in the action at law. "And this," says Hurlburt, J., "*may be conceded where the defendant has an opportunity for that purpose.*"

The discussion as to the characteristics of a judgment, whether a new debt or but a partial merger, is therefore unprofitable.

It comes to this. The notes were released, but the defendant waived that defence. His remedy before judgment was to plead *puis darrien*. His remedy since was to apply to be let in. This he has not done, but has exhibited gross laches. The fallacy of the defence consists in the idea that the court had no power to grant the judgment. It had power, because, as we have seen, it possessed general jurisdiction also of the parties and the subject-matter.

The more we reflect upon the subject, the clearer becomes the conviction that this is simply an ingenious attempt to set up, in an action on the judgment, a defence to the original demand. The authorities, too, in sister States, as well as in our own, are explicit against the defendant's position. (*Mechanic's Bank* v. *Hazard*, 9 Johns., 392; *Steward* v. *Green*, *ubi sup.*; *Rudge* v. *Rundle*, 1 T. & C., 649; *Medbury* v. *Swan*, 8 N. B. R., 537, 46 N. Y., 200, and cases there cited by Allen, J.; *Hollister* v. *Abbott*, 31 N. H., 442; *Bellamy* v. *Woodson*, 4 Geo., 175; *Rees* v. *Butler*, 18 Mo., 173.)

There must be judgment for the plaintiff.

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## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

FEBRUARY 9, 1880.

Where an injunction is modified so as to allow a sheriff to sell attached property, provided he deposits the proceeds as directed by the order subject to the further order of the court, the order must be strictly followed, and such deposit cannot be dispensed with by consent of the parties, even if all the parties in interest join in such consent.

A final order in composition is not a final disposition of the proceeding in bankruptcy, and does not without a further order of the court, place at the disposal of the bankrupt moneys belonging to his estate held by a sheriff subject to the further order of the court.

### *In re MOSES MICKEL and GUSTAV MICKEL.*

THE facts appear fully in the opinion.

*A. Blumenstiel*, for petitioner.

*W. S. Palmer*, for other creditors.

CHOATE, J.—In this case a creditor's petition was filed October 30, 1877. On the 24th of October, 1877, the sheriff of New York County, in the suit of one Hellman, attached certain goods belonging to the bankrupt, and so held them at the time of the filing of the petition. Proceedings for a composition were taken by the bankrupt without an adjudication, and resulted in the acceptance and confirmation of the composition on the 15th of March, 1878. On the 30th of October, 1877, the usual injunction against interfering with the bankrupt's property, except to preserve the same, was issued by this court and served on the sheriff on the 31st of October, 1877, but before the service of the injunction an execution was issued in the suit of Hellman and put in the hands of the sheriff. On the 12th of January, 1878, an order was entered modifying the injunction, "So as not to restrain the sheriff from selling the property in his possession, provided that he shall deposit the proceeds of such sale in the United States Trust Company subject to the further order of the court." This order was entered upon the consent of the petitioning creditors, the alleged bankrupts, and of the creditors claiming liens by execution and attachment on the said property. The sheriff proceeded to sell the property as allowed by the order, having first received a paper signed by all the parties who had consented to the entry of the above order in the following form—"We hereby severally request the sheriff to sell the property levied upon by him, and referred to in the foregoing order, and hereby waive the deposit of the proceeds of such sale in the United States Trust Company as herein provided." The amount realized by the sheriff was one thousand five hundred and twenty-six dollars and twenty cents. On the 15th of March, 1878, or very soon thereafter, the sheriff was served with a copy of the final order in composition, and thereupon, under advice of counsel that the final order in composition was in legal effect the setting aside of the injunction and left him at liberty to apply the money in his hands to the satisfaction of the executions held by him against the bankrupt, he paid to the assignee of one Wallach, the earliest execution creditor, one hundred and sixteen dol-

lars and thirty cents, to said Hellman in satisfaction of this judgment five hundred and ninety-six dollars and sixteen cents, and the balance he kept for his own fees and charges.

The composition was for forty cents on the dollar payable in equal instalments, in three, six, and nine months, for which security was given in the notes of the bankrupts with indorsers. The creditor, Hellman, was bound by the composition agreement. On the 12th of October, 1878, upon proof that the bankrupts had paid no part of their composition, an order was entered setting it aside, with an adjudication of bankruptcy, and appointing an assignee. On the 6th of November, 1879, this last order was vacated and set aside, and declared null and void so far as it set aside the composition, on the ground that it had been entered without notice to the creditors. On the 29th of December, 1879, an order was made requiring the two judgment creditors, who had received the money from the sheriff, to pay the same with interest into the registry of the court, subject to the further order of the court, and with leave to apply for repayment of the same, upon showing their right thereto. The money was so paid in, and the creditor, Hellman, now applies to have the amount paid in by him repaid.

It is not now claimed in behalf of the petitioner Hellman that the issue of the execution to the sheriff, after the filing of of the petition, gave him any new claim to or lien upon the goods. His claim is that the final order in composition dissolved the injunction and left the money, in the hands of the sheriff the absolute and unencumbered property of the alleged bankrupts, subject only to the rights of the judgment creditors, whatever they may have been; that it was property which the bankrupts could, with the consent of those creditors, have demanded of the sheriff and used in their business, or applied to the payment of their composition notes, or to the payment of these particular debts; and it is further contended that the bankrupts, having known of the disposition made of the money by the sheriff and acquiesced therein for nearly two years, must be deemed to have approved of and ratified the use made of the money. There is, however, an obvious answer to this

argument. In the first place, the holding of the money by the sheriff at the time of the final order in composition was in direct violation of the order of the court. The consent of certain parties to waive the deposit of the money in the trust company, which the court had ordered, could not have the effect of dispensing with the deposit, even if the consent had been given by all the parties in interest. It is for the court to judge where money shall be placed in order to secure its safety, and not for the parties, and the orders of the court in that respect must be strictly observed unless modified by the court itself. But the parties consenting were a small part only of the parties in interest, that is, the whole body of creditors for whose protection the order was made. Therefore, so long as the sheriff held the money, in violation and contempt of the order of the court, he could give no party to the cause any right to it whatever. So far as the parties in the cause are concerned who had notice of the facts, they could take no greater right in the money than they would have been able to take if the order had been obeyed and the money had been deposited in the trust company, subject to the order of the court. Nor did the final order in composition operate of its own force, and without a further order of the court to place at the disposition of the bankrupts money belonging to his estate, held by the sheriff subject to the further order of the court. A final order in composition is not a final disposition of the proceeding in bankruptcy. The case in bankruptcy is still pending, and the power of the court continues to stay the proceedings of creditors in suits pending against the bankrupt so long as the composition is unpaid. (*In re* Bayly & Pond, 19 N. B. R., 73; *McGehee* v. *Hentz*, id., 136.) And a conclusive answer to this claim is that the bankrupts themselves could not, without an order of the court, have possessed themselves of the money and paid it in satisfaction of the lien of this creditor, if he had a valid lien by his attachment. It is true that the terms of the composition were such that if the composition agreement is performed, the lien of an attachment less than four months old at the time of the commencement of these proceedings will be

entitled to the money, and, as things stood when the sheriff paid over the money, it is very probable that, upon application to the court, the money so subject to the order of the court would have been applied to the payment of the petitioner's claim. Although it would be within the power and discretion of the court to stay petitioner's proceedings until it was ascertained whether the composition agreement would be carried out, and so all possibility of dissolving petitioner's lien put an end to, yet if there was no reason to anticipate any difficulty in the carrying out of the composition agreement, the petitioner might have had his money (*McGehee* v. *Hentz*, 19 N. B. R., 136); but as this creditor took the law into his own hands, and appropriated the money without leave of the court, subject to whose order it was held, the merits of his application for satisfaction of his lien must be determined by the state of facts existing now, when he first asks leave of the court to take the money.

The circumstances have entirely changed. The bankrupts have entirely failed to pay their composition. They have been again ordered to do so, and proceedings are pending against them to have them punished for a wilful neglect to pay the composition. There is now strong reason to anticipate that the composition will be set aside and an assignee appointed, if the appointment already made is invalid, as is claimed by this petitioner, and in that case the petitioner's attachment will be dissolved, and this money will be distributed among the creditors.

Motion denied without prejudice to its renewal in case, upon the termination of pending proceedings, the composition shall not be set aside.

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## UNITED STATES CIRCUIT COURT—E. D. PENNSYLVANIA.

FEBRUARY 10, 1880.

Where the title to property is in the party who has made advances thereon, the delivery of the possession thereof, subsequent to the failure of the bailee, is not in conflict with the terms or the spirit of the Bankrupt Act.

The exchange of goods, covered by a warehouse receipt, in the warehouse of

the vendor, for others of equal or less value, within four months prior to the filing of a petition in bankruptcy, is allowable, and not in conflict with the thirty-fifth Section of the Bankrupt Act.

The transfer of merchandise, however, by the bankrupts, after their insolvency, in place of goods previously abstracted (although honestly intended), is a preference within the terms as well as the spirit of the Act.

Where there is no fraud, the assignee of a bankrupt firm is estopped from denying the validity of warehouse receipts, issued by the bankrupts.

## *SHARP, Assignee, &c., of STOKES & CO.* v. *THE PHILADELPHIA WAREHOUSE COMPANY.*

THE facts appear fully in the opinion.

*S. H. Alleman*, *S. S. Hollingsworth*, and *R. L. Ashhurst*, for plaintiff.

*George Junkin*, for defendants.

BUTLER, J.—Stokes & Co. were extensively engaged in the importation and sale of goat-skins and sumac, in the city of Philadelphia, between July, 1874, and February, 1878. From time to time they issued "warehouse receipts" for such merchandise, representing the same to be stored with them, the holders of which receipts obtained advances thereon from the defendants. The merchandise had been sold by Stokes & Co. to the holders of the receipts, who had left it on storage—excepting only that covered by a receipt held by German Smith, which was for goods sent to the store on his account.

The bill states that "at the time the advances were made by the defendants the goods were examined by their agent, to see that they corresponded with those called for by the warehouse receipts, were placed in separate lots, and identified by a tag of the company."

Among the advances so made by the defendants was one to George W. Hummel & Co., for thirty-two thousand dollars, on receipts covering the last six items specified in the plaintiff's Exhibit A, accompanying his bill. In December, 1878, Hummel & Co. having resold these goods to Stokes & Co., subject to the defendant's claim upon them, it was arranged between Stokes & Co. and the defendants that the loan should be re-

duced to thirty thousand dollars, that the latter should lease from the former the cellar of the store, deposit the goods therein, and take the keys. This arrangement was carried into effect on the 29th day of the month.

The goods pointed out by Stokes & Co., when the defendants' agent called with the German Smith receipt, were not, in part, those specified in it, though similar in kind.

On the 18th of January, 1878, Stokes & Co., failed to meet their business engagements, and, as subsequent events show, were insolvent. On the 24th of the same month the defendants took a lease of the premises, where the merchandise covered by the receipts which they held were stored, and entered into possession. They then discovered that a large part of the property had been fraudulently abstracted and disposed of by Stokes & Co., who, to meet the claim made on this account, handed over other merchandise to the defendants, worth about two thousand three hundred dollars.

On the 22d of February following, a petition was filed against Stokes & Co., by creditors, and on the 27th of the same month they were adjudged bankrupts.

On the argument several important questions were raised and discussed, which, in the view we take of the case, need not be considered. As respects the goods placed in the cellar, we see no room for controversy; and did not, indeed, understand the claim made on this account to be seriously pressed. Leasing the cellar and removing the goods thereto, constituted a sufficient delivery to satisfy the requirements of the law. That the transaction was free from taint of actual fraud is not doubted. Indeed, it is not suggested that such taint attaches to either of the defendants' transactions respecting any part of the goods in controversy.

The other merchandise covered by the receipts, was, as we have seen, also delivered to the defendants. As, however, this delivery did not take place until after Stokes & Co. had become insolvent (though before proceedings in bankruptcy had been commenced), the plaintiff regards it as a fraud on the Bankrupt Law. We cannot adopt this view. The title to the

property was in the defendants, who could have recovered the possession from Stokes & Co. by law. The surrender of the possession was not, therefore, a violation either of the terms or the spirit of the Bankrupt Act. It did not deprive the creditors of anything which they were entitled to receive. It is unimportant that the surrender could not have been made after seizure on execution. No such question is raised. The effect of the proceedings in bankruptcy alone, is before us for consideration. The case in this aspect cannot be distinguished in principle from *Sawyer* v. *Turpin* (13 N. B. R., 271, 1 Otto, 114), where the defendant (sued by the assignee) had taken a bill of sale from the bankrupt without acquiring possession of the property purchased, and, subsequent to the insolvency, exchanged it for a chattel mortgage—provided for by a statute of the State. The court held that the sale vested the title to the property in the purchaser, as against the bankrupt, that the creditors could not take advantage of the non-delivery, except by execution or attachment, and that the mortgage given in exchange for the bill of sale was therefore valid. In the opinion, Strong, J., says, "the conveyance was by a bill of sale, absolute in terms; . . . . but it was understood by the parties to be a security for an existing debt. . . . . Having been executed more than four months before the petition in bankruptcy was filed, there is nothing to show that it was invalid. . . . . True, no possession was taken under it by the vendee, but for neither of these reasons was it less operative between the parties. It might not have been a protection against attaching creditors, if there had been any. It was in the power of Mr. Turpin, the purchaser, to take possession at any time before other rights against it accrued." The statute which authorized the chattel mortgage referred to in this case in no wise affected the question—which turned upon, and was disposed of, according to general principles governing the sale and transfer of personal property. The case of *Casey* v. *Cavaroc* (6 Otto, 467) is readily distinguished from *Sawyer* v. *Turpin*, and the case before us. The defendant there had but an *agreement* to pledge the property involved.

The transaction amounted to nothing more. And inasmuch as the statute of Louisiana requires a transfer of possession to vest an interest in property pledged, the defendant necessarily failed in his contest with the assignee. While the opinion of the court recognizes this distinction, as is apparent on page 490, it may be conceded that general terms are employed which are not inconsistent with the plaintiff's interpretation of the case. They must be read, however, in connection with what precedes and follows them, and as applicable to the facts involved. It is worthy of remark that in this case three of the justices dissented—holding the defendant's title to be good, as the Circuit Court had done.

We regard it as unimportant that other goods, to some extent, were substituted for those named in the German Smith receipt. At the time this was done the power of Stokes & Co. over their property was not liable to question. Having represented the goods (which the defendants afterward got), to be those specified in the receipt, and the defendants having acted upon this representation, Stokes & Co. could not assert the contrary. The transaction effected a transfer of the property, at a time when no one could object.

As respects the merchandise transferred to the defendants after they became insolvent, to meet the demand which arose out of their previous abstraction of the defendant's property, we agree with the plaintiff. This transfer (though honestly intended) was a violation of the Bankrupt Laws. We cannot regard the property as having passed to the defendants when the abstraction occurred. It did not. Stokes & Co. continued to own it until after their insolvency. It was then too late to apply it to the defendant's claims. It is unimportant that the claim does not arise upon contract. The defendant's rights against the bankrupt's property were not superior to those of the other creditors; and the transfer made was a preference within the terms as well as the spirit of the statute.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JUNE 25, 1879.

The bankrupts were lessees of a building under a lease which permitted them to make such alterations as were requisite to their business, "subject to the clause here following," which provided that at the expiration of the term the lessees would quit and surrender the premises in as good state and condition as reasonable use and wear thereof would permit, damages by the elements excepted. *Held*, That the true construction of these clauses is, that if alterations were made which injuriously affected the state and condition of the building as it was before they were made, it should, at the expiration of the lease, be restored to its former condition in respect to the changes so made; that the fact that the lessor, in anticipation of the expiration of the lease, relet the building to a tenant whose business was such as to make the building as altered convenient for him, does not affect or impair his cause of action against the bankrupts for a breach of their covenant.

On the question as to how much the building has been injured by the alterations, the opinions of experts familiar with the market value of similar premises, and especially with the rental value of such property, are competent.

## *In re ABRAM JEWELL et al.*

THE facts appear fully in the opinion.

*Jacob F. Miller*, for petitioner.
*Chas. W. Marsh*, for opposing creditors.

CHOATE, J.—The bankrupts were lessees of a building for the purpose of carrying on the business of manufacturing lard oil and perfuming lard, under a written lease, which permitted them "to make such alterations to the building requisite to said business, subject nevertheless to the clause here following." The clause referred to was "and at the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted." I think the true construction of these two clauses is, that if alterations were made which affected injuriously the state and condition of the building as it was before making the alterations, it should, at the expiration of the lease, be restored to its former condition in re-

spect to the changes so made. I do not see how otherwise any meaning is given to the words "subject nevertheless to the clause here following."

The lessor permits *any* alterations, however injurious, that the lessees may find "requisite to the business." The parties do not attempt to specify in advance what such alterations shall be, but to secure the lessor against loss in the working of this license he expressly provides that notwithstanding such alterations "the premises hereby demised," that is, the building substantially as it then was, should be surrendered at the expiration of the term in the same state and condition, reasonable use and damage of the elements alone excepted. The construction contended for by the opposing creditors, that the covenant is only to surrender the premises as they may be altered in good state and condition, seems not to me to give full effect to all parts of the instrument, nor consistent with the intent of the parties appearing therein.

The fact that, in anticipation of the expiration of the lease, the lessors relet the building to a tenant whose business was such as to make the building, as altered, convenient for him, seems not to affect or impair the cause of action which the lessor has against the bankrupts for breach of the covenant. The lessees were, as the lessor knew, disabled by their bankruptcy from performing their covenant, and he did not waive any rights by letting the premises to a tenant who happened to want them as they were. It is not for the bankrupts who have broken their covenant to say to the lessor in excuse: "You do not need the restoration of the building to its former condition, which we agreed to make, for your present use of it." Nor is it material whether the lessor has got in fact as good a rent for it in its altered condition as he would probably have got for it if restored. If this is so, it is his good fortune, and there is no reason why it should inure to the benefit of the former lessees. The question simply is how much is the building injured by the alterations, and on this issue I think the opinions of experts familiar with the market value of similar premises, and especially with the rental value of such property,

arose, however, about the items of the settlement, and no final agreement was made as to the disposition to be made of the note. One T. purchased the note before maturity, and without notice of any equities between the maker and payee, for one thousand five hundred dollars. All the parties were citizens and residents of the State of New York. In an action on the note in the State Court, T. recovered a judgment for the whole amount of the note, which judgment was reversed on appeal and a new trial granted, unless plaintiff should consent to reduce the judgment to the amount paid by him and interest. On proof of claim, *Held*, That the judgment of the appellate court was not a conclusive determination of the rights of the parties in this proceeding; that the note having been negotiated in the State of New York, and all parties being residents thereof, the rights of the claimant are controlled by the law of that State, and that in accordance with the decisions of that State, the claimant is only entitled to prove for the amount paid by him with interest. 359

Rosenbaum *v.* Garnett, Assignee, etc.

The bankrupt court has summary jurisdiction over all contracts made with itself respecting the bankrupt's property.

Where, on the release of goods under seizure by the marshal, a bond is given for the production of the property or its value, the court may order the property or its value to be brought into court by the parties to the bond. 370

The Revere Copper Co. *v.* Dimock.

Where a defendant omits to plead his discharge in bankruptcy, but allows judgment to be recovered against him, such discharge is no defence to an action on the judgment. 372

*In re* Moses and Gustav Mickel.

Where an injunction is modified so as to allow a sheriff to sell attached property, provided he deposits the proceeds as directed by the order subject to the further order of the court, the order must be strictly followed, and such deposit cannot be dispensed with by consent of the parties, even if all the parties in interest join in such consent.

A final order in composition is not a final disposition of the proceeding in bankruptcy, and does not without a further order of the court, place at the disposal of the bankrupt moneys belonging to his estate held by a sheriff subject to the further order of the court. 374

Sharp, Assignee, *v.* The Philadelphia Warehouse Co.

Where the title to property is in the party who has made advances thereon, the delivery of the possession thereof, subsequent to the failure of the bailee, is not in conflict with the terms or the spirit of the Bankrupt Act.

The exchange of goods, covered by a warehouse receipt, in the warehouse of the vendor, for others of equal or less value, within four months prior to the filing of a petition in bankruptcy, is allowable, and not in conflict with the thirty-fifth Section of the Bankrupt Act.

The transfer of merchandise, however, by the bankrupts, after their insolvency, in place of goods previously abstracted (although honestly intended), is a preference within the terms as well as the spirit of the Act.

Where there is no fraud, the assignee of a bankrupt firm is estopped from denying the validity of warehouse receipts, issued by the bankrupts. 378

*In re* Jewell et al.

The bankrupts were lessees of a building under a lease which permitted them to make such alterations as were requisite to their business, "subject to the clause here following," which provided that at the expiration of the

term the lessees would quit and surrender the premises in as good state and condition as reasonable use and wear thereof would permit, damages by the elements excepted. *Held*, That the true construction of these clauses is, that if alterations were made which injuriously affected the state and condition of the building as it was before they were made, it should, at the expiration of the lease, be restored to its former condition in respect to the changes so made; that the fact that the lessor, in anticipation of the expiration of the lease, relet the building to a tenant whose business was such as to make the building as altered convenient for h' n, does not affect or impair his cause of action against the bankrupts for a breach of their covenant.

On the question as to how much the building has been injured by the alterations, the opinions of experts familiar with the market value of similar premises, and especially with the rental value of such property, are competent.

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# SYNOPSIS OF CASES, No. 9.

*In re* Peter Herdic.

The burden of sustaining specifications of objection to a discharge is upon the opposing creditors

The provision of Sec. 5110, in relation to keeping proper books of account, applies only to merchants or tradesmen, and as to them must be understood as requiring the keeping of proper books of account only in respect to the bankrupt's business as a merchant or tradesman. If he has kept such books he is entitled to a discharge, although he may not have kept proper books of account touching other business transactions. 385

*In re* Dumahant et al.

A composition was accepted and confirmed, which provided that the assets, which had within three months before the bankruptcy been assigned for the benefit of creditors, should remain in the hands of the voluntary assignee and be distributed by him. Previous to the confirmation, petitioner had commenced a suit against the assignee in a State Court for an accounting and distribution of the assigned property. This suit being continued and large expenses incurred, an amendment to the composition was accepted, by which the assigned property was to be delivered to the assignee in bankruptcy and distributed by him. This amendment was confirmed on condition of payment to petitioner of such sum toward reimbursement of his expenses in said suit as the court should award to be proper. It appeared that at the commencement of said suit the voluntary assignee was ready to pay a dividend but was stopped by injunction, and that petitioner reduced the assignee's claims, but had incurred large expenses for receiver's and referee's fees, and also claimed five hundred and fifty dollars as an extra allowance, which it was alleged he would have been entitled to if a decree had been entered in that suit. *Held*, That, it not appearing that the assignee's claims could have been adjusted without suit, the suit was not beneficial to the creditors; that under the provisions of the original resolution the petitioner had no absolute right to have the property remain in the hands of the voluntary assignee; that no right to the cost and expenses of the suit had become vested in the petitioner; that it therefore had no interest which was secured to it under Section 17 of the Bankrupt Act, and was not entitled to reimbursement for the expenses and costs of said suit. 393

Oliver *v.* Cunningham et al.

Where an assignee of a bankrupt defendant is appointed during the pendency of an action, the other defendants have no right to have him made a party. If they have a claim for contribution against the bankrupt, their remedy is by intervention in the bankruptcy proceedings. 400

*In re* The Southwestern Car Company.

Under the laws of Indiana, convicts may be hired in any number not exceeding one hundred in any one contract. The bankrupt entered into four separate contracts with the State for the employment of one hundred convicts under each contract. The contracts were all executed at the same time but were signed by different sureties. *Held*, That the execution of these contracts was not a violation of the letter or spirit of the statute, and that the contracts are valid and binding.

By the terms of the contracts the State was to keep the convicts under good discipline and to keep them at diligent and faithful labor for the bankrupt. This was not done. *Held*, That the loss and damage sustained by reason of the failure of the State to perform these stipulations should be deducted from the contract price in estimating the amount due to the State upon the contracts.

A claim of the State upon a contract for the employment of convicts is entitled to preference under Section 5101. 404

*In re* Simon Moses.

Whatever money or property is in the possession of the bankrupt at the time of filing his petition, which he is actually using and holding as his own,

are competent. The witness Naylor seems to have had sufficient experience to make him a competent witness on the question of the extent of the damage. Evidence also of the cost of restoring the building to its former condition would be competent. Although Mr. Naylor's experience was as a builder and not as a repairer of buildings, yet he had such an experience as to the cost of materials and labor that I think he should have been allowed to testify on this point also.

Report recommitted, with instructions to give the parties a further hearing.

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UNITED STATES DISTRICT COURT—W. D. PENNSYLVANIA.

FEBRUARY 14, 1880.

The burden of sustaining specifications of objection to a discharge is upon the opposing creditors.

The provision of Sec. 5110, in relation to keeping proper books of account, applies only to merchants or tradesmen, and as to them must be understood as requiring the keeping of proper books of account only in respect to the bankrupt's business as a merchant or tradesman. If he has kept such books he is entitled to a discharge, although he may not have kept proper books of account touching other business transactions.

## *In re PETER HERDIC.*

SPECIFICATIONS of opposition to the bankrupt's discharge.

*Henry C. Parsons*, *H. C. McCormick*, and *Mr. Crocker*, for creditors opposing discharge.

*Clinton Lloyd* and *John M. Kennedy*, for bankrupt.

ACHESON, J.—Certain creditors of the bankrupt, Peter Herdic, having filed specifications of opposition to his discharge, they were referred to Frederick E. Smith, Esq., register, with directions to take testimony thereon and make report of the facts to the court. The register took and returned to the court the testimony offered by the respective parties and made a report favorable to the bankrupt upon all the specifications.

Upon the coming in of the Register's report the case was fully and very ably argued by the counsel of the opposing creditors and of the bankrupt. Since the argument I have attentively read the testimony, and the case has received careful consideration. The circuit judge (McKennan) sat with me at the hearing, and the conclusions I have to announce were reached after consultation with him, and have his approval.

The specifications of opposition are thirteen in number; but the fifth, sixth, seventh, twelfth, and thirteenth, were not pressed at the argument. In respect to them, therefore, I content myself with saying that the evidence does not sustain them, or any of them.

The first and second specifications relate to the same matter, and may be considered together. They charge, in substance, that the bankrupt "has wilfully sworn falsely" in the affidavit attached to his petition, in this, that in his schedule he returns that he has no real estate in his possession or enjoyment or which is held by any other person in trust for his use (except as therein stated), when in truth and in fact he was interested as the owner of the undivided one-third of certain lands in Potter County, Pennsylvania, then held in trust for him by one Jacob Tome, and which he did not return, but wilfully and fraudulently omitted from his schedule.

The facts relating to these lands are as follows: By deed bearing date October 19, 1872, Jane Phillips conveyed to Jacob Tome, of Port Deposit, Maryland, twelve tracts of land in Potter County, Pennsylvania, containing in the aggregate about eleven thousand three hundred and eighty-five acres, for the consideration of forty-five thousand two hundred and forty dollars. An article of agreement (not recorded) of the same date with this deed was entered into between Jacob Tome, Peter Herdic, and A. G. Olmstead, which recites the purchase by these parties of said lands; that Tome had paid in hand one-third of the purchase money and was to pay the residue, which was secured by his mortgage, in one and two years, with interest; that the title was vested in Tome in

trust for himself and Herdic and Olmstead; that the lands were to be sold at such times and prices as the parties should think advisable, and, until sold, Herdic and Olmstead should pay Tome interest on two-thirds of the amount of each payment of purchase money made by him, at the rate of seven per cent. per annum, and each party should pay one-third of the taxes; that when the lands were sold Tome should be first reimbursed the purchase money paid by him, and the balance of the proceeds of sale should then be equally divided between the three parties.

Jacob Tome paid the entire purchase money. Herdic paid his stipulated share of the interest which accrued up to October 19, 1875, but he paid no interest subsequently accruing.

The parties made no sales of any part of these lands. They were never able to dispose of them at an advance, or, indeed, for the price Tome had paid for them.

Herdic being in arrear for his share of the taxes, his interest in said land was sold for taxes at treasurer's sale on June 10, 1878, and purchased by Jacob Tome, to whom the treasurer of Potter County executed a deed.

Mr. Tome testifies that he and Olmstead have been and are willing to sell these lands at what they cost, and even for less. From the uncontradicted evidence it is manifest that at the time when the bankrupt made his affidavit, these lands were not worth the money Jacob Tome had invested in them. The bankrupt's interest in them was, therefore, of no value whatever had it then been redeemed and unincumbered. But it appears that whatever redeemable interest the bankrupt then had was incumbered by unimpeachable liens amounting to far more than the value of the entire twelve tracts.

In explanation of the omission from his schedule of his interest in these lands, Mr. Herdic testifies: "It had been sold at treasurer's sale, and I didn't think it belonged to me." Under all the circumstances I accept this explanation as reasonable and truthful. Certainly the evidence does not warrant the harsh conclusion that the bankrupt "has wilfully sworn falsely" touching this matter.

The third and fourth specifications relate to the alleged concealment by the bankrupt of certain personal property. The third specification charges that the bankrupt has concealed and failed to deliver to his assignees twenty-five thousand dollars which he received from Jacob Tome a few months before the filing of his petition in bankruptcy. The fourth specification charges the like concealment of and failure to deliver to the assignees the sum of ten thousand dollars which it is charged the bankrupt delivered to his friends to purchase at sheriff's sale, for his use and benefit, his household goods and other property, and that the money was so applied.

It appears that on January 24, 1878, Mr. Herdic received from Jacob Tome the latter's notes for twenty-five thousand dollars, given in the purchase of certain bonds issued by the Minnequa Springs Improvement Company. On or about that date Herdic discounted Tome's notes at Philadelphia. Out of the proceeds Herdic paid ten thousand and ten dollars and sixty-nine cents to the Manufacturers' National Bank of Philadelphia, in discharge of his indebtedness to that bank. This is proved by John W. Moffly, president of the bank. Mr. Herdic testifies to other proper payments, in discharge of his liabilities, made with the moneys realized from the discount of the Tome notes. After these payments there remained in his hands about ten thousand four hundred dollars which he brought to Williamsport. At that time W. F. Reynolds & Co., the plaintiffs in a judgment against Herdic, had an execution for ten thousand dollars in the hands of the sheriff of Lycoming County. This execution had issued January 22, 1878. Undoubtedly, the evidence shows that it was originally the intention of Mr. Herdic to apply the ten thousand four hundred dollars he brought from Philadelphia to the Reynolds execution. But he soon found himself hopelessly pressed by other creditors and abandoned his purpose to pay off Reynolds & Company's judgment. He testifies that he applied the whole of the ten thousand four hundred dollars to the payment of debts and to the maintenance of his family, and that it was all so used within two months after he got it. To some extent he particularizes his ex-

penditures. It certainly would have been more satisfactory had his testimony on this subject been more explicit. He swears positively, however, that no part of this money was furnished to friends to be used in purchasing in his property at sheriff's sale, and in this he is not contradicted. It is not pretended that there is any direct evidence that any of the money in question was used for the purpose charged in the fourth specification. But the court is asked to draw such inference. I agree with the learned counsel for the creditors that suspicious circumstances may be so strong as to authorize a court to find the concealment or fraudulent appropriation of money by a bankrupt. But I altogether fail to find such circumstances in this case. It is well settled that the burden of sustaining specifications of objection is upon the opposing creditors. It is always a fair presumption that the bankrupt has acted with integrity.

The eighth specification charges that the bankrupt has wilfully sworn falsely in the affidavit attached to his petition, in that he has wilfully omitted from his schedule certain amounts received by him on August 26, 1878, to wit: from J. W. Maynard, five thousand dollars, from Guy W. Maynard & Co., three thousand five hundred and seventy-nine dollars and forty-two cents, and from G. W. Maynard & Co., twenty-seven thousand five hundred and seventy-two dollars and sixty-seven cents. To sustain this specification the opposing creditors rely upon certain entries in the books of the bankrupt made on said date, whereby the accounts of the persons above named are respectively credited with the sums mentioned. But the evidence is plenary that the bankrupt did not receive at that time said sums, or any part thereof. This specification therefore falls. The said entries are part of those which are the foundation of the eleventh specification, and were made under the circumstances and for the purpose hereinafter stated.

The ninth specification charges that the bankrupt having knowledge that Charles E. Gibson had proved a false and fictitious debt against him of three thousand nine hundred dollars, did not disclose the same to his assignees within one month after he acquired such knowledge. I am by no

means prepared to say that the evidence warrants the conclusion that Gibson's proof of debt is of the character here alleged. But if this ever so clearly appeared, it would be essential to show that the bankrupt had knowledge of the fact in order to sustain this specification. Of such knowledge on the part of the bankrupt there is no evidence. Gibson's proof, indeed, was sworn to at the office of Mr. Herdic, before Mr. Hinkley, a notary public, who had been, and perhaps then was, in the bankrupt's employ. But it does not appear that Mr. Hinkley had any reason to doubt the correctness of Gibson's claim. Mr. Herdic himself took no part in the preparation of Gibson's proof, did not examine it, and was not consulted with respect to it.

The tenth specification charges that the bankrupt, being a merchant, has not at all times since the second day of March, 1867, kept proper books of account, in that such books do not show what moneys were received and what disposition was made of them. And the eleventh specification charges, that he has not kept proper books of account, in that on the 26th of August, 1878, three days before the filing of this petition in bankruptcy, he caused fifteen pages of entries to be made in his day-book of business transactions, amounting to at least one million of dollars, and most of said transactions having occurred several years prior to said entries.

These specifications designate the bankrupt as a "merchant;" and the evidence, I think, does show him to have been a dealer in lumber, as a merchant within the meaning of the bankrupt law. His transactions in lumber seem to have been principally as a partner with other parties, but to some extent he was individually a dealer in lumber. Besides his dealings as a lumber merchant, Mr. Herdic had very large business transactions. He extensively bought and sold real estate, was largely engaged in laying street pavements, and carried on other enterprises of magnitude, which had no connection with his business as a merchant.

The Bankrupt Law, which withholds a discharge—"If the bankrupt, being a merchant or tradesman, has not at all times,

after the second day of March, 1867, kept proper books of account." This requirement applies only to merchants and tradesmen (Blumenstiel, 521); and as to them must be understood as requiring the keeping of proper books of account only in respect to the bankrupt's business as a merchant or tradesman. If he has kept such books he is entitled to his discharge, although he may not have kept proper books of account touching other business transactions. It was strenuously urged at the argument that the bankrupt was not entitled to his discharge, because he had kept no cash-book or proper cash account, and authorities were cited to show that the failure by a bankrupt, he being a merchant or tradesman, to keep a cash account, is good ground for refusing his discharge.

The opposing creditors produced in court, and deposited with the clerk, five books of the bankrupt, viz.: One blotter, one day-book, marked "Journal E," one ledger, marked "C," and two bills payable books. But these are a part only of the books kept by the bankrupt. At page 118 of the testimony, the register notes an offer of evidence by the creditors, of "all the books delivered by Peter Herdic to the assignees," and these are there stated as "Ledgers A., B., and C., Journals A., B., C., D., and E., Book of bills receivable, two Books of bills payable, two Blotters, and Journal B. and Ledger B., labeled 'P. H.'s'" But as I understand the evidence, this formal offer does not embrace all the books of account which the bankrupt kept; for the assignees and Mr. Hinkley testify that still other books of account of the bankrupt, by and with the acquiescence of the assignees, were not delivered into their actual custody, but for safe keeping were left at Mr. Herdic's office.

Not having before us all the books, it is impossible to decide, by inspection, whether or not a proper cash account was kept. Resort must therefore be had to the testimony.

The following question and answer appear in the testimony of C. C. Taylor, the book-keeper. Q. "Where is the cash-book of Mr. Herdic?" A. "He didn't keep any." (Page 88 of evidence.) It will be observed that the witness does not say

that Herdic kept no cash *account*, and, from his testimony as a whole, the inference is a fair one that a proper cash account was kept. Upon this subject, Mr. Hinkley, an expert in book-keeping, was examined on behalf of the creditors, and was asked by their counsel the following question: "Where is the cash-book of Mr. Peter Herdic?" To which he answered: "For his individual use, he kept no cash-book. For his lumber accounts, cash-books were kept. These books are at the office." (P. 58.) This witness further testifies: "As I stated before, he had kept lumber books, and that these lumber books are cash-books." (Ibid.) Again, in his examination in chief, he was asked: "Did he keep any individual cash account?" To which he answered: "He did in his individual lumber books." (P. 59.) In the cross-examination of this witness, the following questions and answers occur: Q. "Were there regular books of account, cash-books and others kept, showing his transactions in lumber?" A. "There were." (P. 62.) . . . . . Q. "Were those books properly kept, showing the transactions in lumber, in your judgment as a book-keeper?" A. "Yes, sir." This evidence stands uncontradicted.

I now approach what I consider the most doubtful question in the case. On August 26, 1878—three days before the filing of the petition in bankruptcy, by the direction of Mr. Herdic, fifteen pages of entries were made in his books, all under said date, and aggregating considerably more than one million of dollars. Did these entries concern Mr. Herdic's business as a merchant? This, it seems to me is the vital question. For if they relate to transactions distinct from his business as a lumber merchant, it is immaterial that they were not duly made in the proper course of book-keeping. I fail to discover, in the testimony of the witnesses, anything to show to what branch of the bankrupt's business the entries in question relate. But an inspection of the books themselves has satisfied me that a large proportion thereof—both as respects number and amount—have no connection whatever with the lumber business, but relate to other matters. As to the nature of many of the entries I can form no opinion. A few seem to have re-

lation to the bankrupt's business as a merchant, but this I cannot affirm certainly.

The evidence, however, does show that the making of these entries was a transaction entirely free from any taint of fraud. The purpose was to close worthless accounts, and old accounts long previously settled, but never entered on the books. The entries were made after consultation with Register Smith, and under his advice, with a view to excluding from the schedule worthless accounts. It is not shown that the entries in any wise worked injury to the bankrupt's estate or were prejudicial to creditors.

Upon the whole, therefore, I am brought to the conclusion that neither the tenth nor the eleventh specification has been sustained.

The specifications of opposition having been disposed of upon their merits, it has been deemed unnecessary to consider the exceptions thereto filed by the bankrupt.

I am of opinion that all the specifications should be overruled, and the bankrupt granted his discharge, upon the presentation of the register's certificate of his conformity to the provisions of the law.

And it is so ordered.

McKennan, J.—I sat at the argument of this case with the district judge, in order that the delay in the final determination of it, which might result from an appeal to the Circuit Court, might be avoided. The foregoing opinion, therefore, is to be understood as expressing the views of both of us, and as practically deciding the controversy.

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## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

### JANUARY 11, 1879.

**A composition was accepted and confirmed, which provided that the assets, which had within three months before the bankruptcy been assigned for the benefit of creditors, should remain in the hands of the voluntary assignee and be distributed by him. Previous to the confirmation, petitioner had commenced a suit against the assignee in a State Court for an**

accounting and distribution of the assigned property. This suit being continued and large expenses incurred, an amendment to the composition was accepted, by which the assigned property was to be delivered to the assignee in bankruptcy and distributed by him. This amendment was confirmed on condition of payment to petitioner of such sum toward reimbursement of his expenses in said suit as the court should award to be proper. It appeared that at the commencement of said suit the voluntary assignee was ready to pay a dividend but was stopped by injunction, and that petitioner reduced the assignee's claims, but had incurred large expenses for receiver's and referee's fees, and also claimed five hundred and fifty dollars as an extra allowance which it was alleged he would have been entitled to if a decree had been entered in that suit. *Held*, That, it not appearing that the assignee's claims could have been adjusted without suit, the suit was not beneficial to the creditors; that under the provisions of the original resolution the petitioner had no absolute right to have the property remain in the hands of the voluntary assignee; that no right to the cost and expenses of the suit had become vested in the petitioner; that it therefore had no interest which was secured to it under Section 17 of the Bankrupt Act, and was not entitled to reimbursement for the expenses and costs of said suit.

## *In re EDWARD G. DUMAHAUT et al.*

THE facts appear fully in the opinion.

*Wilson G. Powell*, for Bull's Head Bank.
*W. B. Hornblower*, contra.

CHOATE, J.—In this case a composition was accepted and confirmed by the terms of which the assets of the firm, which, within three months before the bankruptcy, had been assigned by the debtors to a voluntary assignee for the benefit of creditors, were to remain in his possession and be distributed under that assignment and the dividends so made were to be accounted as part of the agreed composition payments after the acceptance of this composition; but before its confirmation the Bull's Head Bank, a creditor, commenced a suit against the assignee, in the Supreme Court of the State of New York, to compel an accounting by him and a distribution of the assigned property according to the terms of the assignment. In this suit a receiver was appointed who has, however, never taken possession of the property nor been able to do so, partly in consequence of an injunction from this court and partly from the absence of the assignee from the State. The suit having

gone to a reference, and various expenses having been incurred by the plaintiff for costs and disbursements in the cause, and for counsel fees and referee's fees, and the receiver being, or claiming to be, entitled to fees and for charges for counsel, it was found principally on account of the delay caused by the pendency of that suit and the adverse claims of the receiver appointed therein to carry into effect the composition according to its terms, an amendment thereof was proposed and submitted to the creditors, who approved of the same. The amendment consisted in altering the terms of the composition so that the assigned property should not remain in the possession of the voluntary assignee, but should come into the possession of the assignee in bankruptcy and be administered by him. The court confirmed this amendment, adding to the usual order for recording the resolution the following words: "Upon the condition precedent to the taking effect thereof that the bankrupt and the creditors who have signed the said resolution of amendment shall pay to the Bull's Head Bank such sum toward reimbursement of their expenses in and about the action brought by it in the Supreme Court of the State of New York against the voluntary assignee as this court shall award to be proper." Such sum to be ascertained by a reference to the register to whom it was by the same order referred, "to take testimony and to report to this court as to what sum, if any, shall be paid to said bank as aforesaid."

The Bull's Head Bank had objected to this amendment, and the condition inserted in the order of confirmation was doubtless designed to protect and provide for any right which the bank might have to the reimbursement of such expenses under the Seventeenth Section of the Act of June 22, 1874, which provides that a composition may be varied by a new resolution of the creditors, but "without prejudice to any person taking interest under such provisions" (*i. e.*, the provisions of the original composition) "who do not assent to such addition or variation." But it is evident from the very terms of the order of confirmation that the question whether the bank was entitled to the reimbursement of these expenses was

not and was not intended to be passed upon by the court, but was reserved until after the testimony was taken and the report of the register was made. From this order, confirming the resolution varying the composition, the bank appealed to the Circuit Court by petition of review, and the order was affirmed. (See opinion of Waite, Ch. J., MS.) Before that appeal was taken the bank applied to this court to be permitted to apply to the State Court to have the fees of the receiver determined by that court. This application was denied, on the ground that if any such expenses could be allowed they should be passed on in the same manner in which the other expenses of the bank in that suit were to be determined. (*In re* Dumahaut, 17 N. B. R., 517.) The register has now made his report, by which and by the testimony taken it appears that the bank has paid out in cash disbursements in that suit seventy-four dollars; that it is liable to the referee for his fees, which he claims to be five hundred dollars; that the receiver claims for his services three hundred and fifty dollars, and for his counsel fees one hundred and fifty dollars; that the taxable costs the plaintiff would be entitled to if a final decree in his favor in the suit were entered would be one hundred and thirty dollars, independently of the foregoing, and it is claimed also that upon such decree the court would award to the plaintiff as an allowance and addition to its costs five hundred and fifty dollars.

No claim seems to have been made by the bank for its counsel fees in the suit beyond said sum of five hundred and fifty dollars. Mr. Register Dwight has reported that the bank is not entitled to be paid any part of these sums, on the ground that the charges, disbursements, and services, for which the bank claims reimbursement, were not beneficial to the creditors but the contrary. And the question now is, whether the report of the register shall be confirmed.

There are two questions to be determined, *first*, whether the suit brought by the bank nominally for itself and all the creditors was in fact beneficial to them, and *secondly*, whether, if that suit has not been beneficial to the creditors, the right of

the bank to have its expenses in the end reimbursed is preserved to it, whether it is one of those interests under the provisions of the original composition which are expressly protected by the statute allowing a variation of a composition. If the expenses incurred have been positively beneficial to the estate, then, upon the equitable principle that has been so often applied in the case of expenses incurred by a voluntary assignee, there would seem to be a just and equitable claim for reimbursement. On this question I entirely concur in the conclusion of the register. I think the evidence shows clearly that the suit, instead of being a benefit has been a serious injury to the other creditors and to the estate of the bankrupt. Pending the confirmation of a composition, which the requisite majority of the creditors had assented to, and so far as appears without consultation with any other creditor, the bank commenced proceedings for having the assigned property wound up and distributed in a suit in equity in the Supreme Court of the State, in its nature a tedious and expensive process. There is nothing to show that such proceedings were necessary. The assignee had given bond which had been approved as sufficient. His delay in distributing what had been turned into money up to that time had been occasioned by the pendency of the bankruptcy proceedings, but the testimony shows that he was ready and willing to distribute it as soon as the uncertainty about the composition should be determined. Without drawing in question as regards this point the right of the bank as a *cestui que trust* under the deed of assignment to institute and carry on such suit, he must establish before he can be reimbursed his expenses in this court out of the bankrupt's estate, on the ground that his proceedings were taken for the benefit of the estate, that there was some good reason to believe, in the circumstances existing at the time the suit was commenced, that without such proceedings the assignee would not have gone on and voluntarily have done in the discharge of his trust what the creditor bringing the suit has sought to compel him to do by the suit, that is, to convert the property into money and distribute it among the creditors. This the bank has wholly

failed to show; on the contrary, it appears that checks were drawn for the payment by the assignee to the creditors of ten per cent. of their debts, the amount then in his hands in money, which payment was stopped by an injunction in said suit. It is claimed, however, that the bank has by its proceedings in the suit reduced the assignee's claim for disbursement six hundred dollars, and for commission four hundred and ninety-four dollars and eighty-five cents, and he has also had the accounts adjusted and settled, and that this is a sufficient benefit to the whole body of the creditors to entitle the bank to reimbursement. But it does not appear that there was any such dispute about any of these matters, or any such reason to apprehend serious disagreement, as to render a long and expensive lawsuit necessary for their determination, or that all these matters could not have been easily adjusted without any suit. After the composition was accepted and confirmed, the bank still went on with the suit and virtually made it impossible to carry into effect the terms of that composition, and the suit has only caused delay and embarrassment to the creditors.

The composition, as originally adopted, provided that the voluntary assignee should hold and distribute the assigned property. It was not within the contemplation of this provision that the assigned estate should be wound up and distributed at the end of a protracted suit in equity, but voluntarily by the assignee and without any unnecessary expense or delay. The inserting this provision in the composition resolutions, therefore, while it amounted to an affirmance of the voluntary assignment by the creditors to the extent that it was to stand, and so long as the composition was not varied it prevented the bankrupt assignee from attacking the assignment and having it set aside as void under the bankrupt law, it did not, as seems to be supposed by the bank, make all the proceedings of the bank taken afterward in harmony with the terms of the composition, or any the less an obstruction to that composition being carried into effect, for no such proceedings by delegation were contemplated by the creditors. Nor did the fact that the creditors generally appeared before the assignee and

proved their claims amount to an approval of the bank's proceedings. They must prove, or run the risk of losing their share of the assigned estate.

The finding of the register, therefore, that the services and charges for which reimbursement is sought were not beneficial but injurious to the creditors, must be approved. To hold otherwise would be to encourage unnecessary litigation.

As to the other question, whether the reimbursement of these expenses is secured to the bank by the statute which provides for an amendment of a composition without prejudice to any person taking interest under the original composition, the decision of the Chief Justice is conclusive that under this provision of the statute the original composition gave the bank no absolute right to have the assigned estate remain in the possession of the voluntary assignee; that such a provision in a composition regulating the mere modes of administering the property of the person by whom it is to be administered is not such an interest as is saved by the statute. It cannot, therefore, be said that the bank went on after the confirmation of the original composition relying on this arrangement as a thing secured to it of right, and if in fact the bank was induced by the circumstance that this arrangement had been made to believe that it might safely go on and incur these expenses it was because it overlooked the fact that the creditors might at any time vary this provision and direct the administration of the property by the bankrupt assignee. The bank has in this only itself to blame for its want of foresight; its misfortune is not entitled to any consideration, since its own persistent obstruction of the carrying out of the creditors' first plan has led to such a change in the terms of the composition as will now render it impossible for the bank to pursue its suit to a final decree so as to recover its costs in the State Court. Nor is there any accrued right of the bank in these costs and expenses which had become vested in the bank before the change in the composition was made. The right to costs in an equity suit is wholly in the discretion of the court, and does not become a vested right till the court by decree or order awards

them, and although it might confidently be expected, according to the known practice of the State Court in like cases, that the bank would in the end recover these expenses or the greater part of them, yet no such right has yet accrued. The claim for reimbursement of these expenses and costs cannot, therefore, in any sense be regarded as an interest acquired by the bank under the original composition which is saved to it by the statute. This question was not before the Chief Justice, and the allusion to the matter in his opinion, which is relied upon by the learned counsel for the bank, means only, as I understand it, that if the bank has any right to be reimbursed, that right is sufficiently secured by the reference ordered by this court to determine that question.

As to the costs of this reference, the claim of the bank being entirely groundless, I think it should be charged with those costs.

Report confirmed and the costs of reference charged against any payment coming due to the bank under the composition.

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UNITED STATES CIRCUIT COURT—W. D. MICHIGAN.

**Where an assignee of a bankrupt defendant is appointed during the pendency of an action, the other defendants have no right to have him made a party. If they have a claim for contribution against the bankrupt, their remedy is by intervention in the bankruptcy proceedings.**

## *DAVID D. OLIVER* v. *HENRY S. CUNNINGHAM et al.*

THE facts appear fully in the opinion.

*Alfred Russell*, for complainant.
*H. M. Duffield*, for defendant and petitioner.

WITHEY, J.—Garret B. Hunt, one of the defendants, has filed a petition to have the proceedings in the suit stayed until the assignees in bankruptcy of Cunningham, Haines and Robinson

are made parties defendants. It appears by the petition that the three last named defendants have been adjudicated bankrupts, and that assignees have been appointed upon proceedings in bankruptcy instituted subsequent to the commencement of this suit.

Also that defendant Robinson has received a discharge, and that Cunningham and Haines have applied to be discharged. At the commencement of this suit the title of the lands which are the subject matter of the bill was in defendant Cunningham, which title has devolved upon his assignees by virtue of the proceedings in bankruptcy.

Counsel for petitioner insists that all persons who may be affected by the decree should be made parties; that such assignees would be affected by a decree in favor of complainant, and that the case cannot properly be heard, therefore, until they are made parties—neither they as assignees, nor the land held by them will be concluded by the decree. Cases cited appear to sustain such views. Anon. (10 Paige, 20) is a foreclosure case, where the equity of redemption or legal title passed to the defendant's assignees in bankruptcy subsequent to commencement of suit and prior to decree. Chancellor Walworth said the suit had become defective, and could not be further proceeded in until the assignee in bankruptcy was made a party; that the assignee was not in the situation of a mere purchaser *pendente lite*, as the equity of redemption was cast upon him by law. It was followed in other cases (1 Barb. Ch., 246; 2 id., 596; 3 id., 360; 1 Sandf. Ch., 135; 3 McLean, 487), which were also cited by counsel.

If the cases referred to are to govern it, it is manifest that the assignees of the bankrupt defendant, to whom the title to any of the property involved in the suit has come, should be made parties in order to reach the interest held by them.

But as we understand the opinion of the Supreme Court of the U. S. (*Eyster* v. *Gaff et al.*, 13 N. B. R., 546, 91 U. S., 521), we are not at liberty to follow the New York cases, or the views expressed in 3 McLean.

Thomas and James Gaff in 1868 instituted suit to foreclose a mortgage against McClure. Pending the foreclosure pro-

ceedings he was declared a bankrupt upon a petition filed pending the suit, and an assignee was appointed; the decree of foreclosure and sale was rendered nearly two months after the adjudication that McClure was a bankrupt, and about a month after the appointment of the assignee.

Gaffs purchased at the sale, received the master's deed, and the sale was duly confirmed; they then brought a suit in ejectment against the mortgagor's tenant, who defended on the ground that all proceedings in the foreclosure suit since the appointment of the assignee in bankruptcy were absolutely void, because he was not made a defendant.

The Supreme Court says, "but for the bankruptcy of McClure" by the decree and sale; the title would have vested in the purchaser and this would have related back to the date of the mortgage, the inquiry is then made, is there anything in the Bankrupt Law which takes the title to the premises acquired by the assignee out of this rule?

It was maintained by counsel, that, because the assignee in bankruptcy is vested by the assignment under the statute with the legal title, there remains nothing from that time for the decree of foreclosure to operate on. The court, however, says: "If this be true in this case it must be equally true in other suits in which the title is transferred *pendente lite*." The court proceeds to state the ground of its decision, and reaches the conclusion that there is no reason why the same principle should not apply to the transfer made by a bankruptcy proceeding as to a sale and conveyance by the mortgagor pending suit; and that in neither case is the court prevented from proceeding in the suit without the person in whom the title has vested, and that the title of the purchaser under the decree would not in such case be affected. It is further said, if there is any reason for interposing, the assignee can have himself substituted for the bankrupt, or made a defendant on petition. If he chooses to let the suit proceed without such defense, he stands as any other person would on whom the title has fallen since the suit commenced.

It is said by petitioner's counsel, *Eyster* v. *Gaff* is not in

point, for the reason that the claim there made was that the foreclosure proceedings, under which Gaffs claimed title, were void for want of jurisdiction, because the assignee in bankruptcy was not made a party, and that such want of jurisdiction was sought to be set up in the ejectment suit, not in the foreclosure suit. But the court takes the broad ground, from which there appears to be no escape, that there is nothing in the Bankrupt Law or in the nature of proceedings in bankruptcy, which takes the interest in the mortgaged property acquired by the assignee out of the rule which governs as to voluntary conveyances by a defendant mortgagor *pendente lite*. This is an assertion by the Supreme Court of the doctrine that, in effect, the parties to the suit may wholly disregard the fact that the legal title to the property in controversy has, since commencement of suit, become vested in an assignee of a bankrupt defendant.

Again, it would seem that defendant Hunt should have brought forward his petition at an earlier stage of the suit, if his interests required other powers to be made parties, and that he should not now be permitted, after the cause is noticed for hearing, to have the delay necessary to bring them in. I do not concede that it is his right to have them made defendants; the assignees were bound to take notice of suits pending against the bankrupts at the time of their appointment, and had a right to appear and defend any interest represented by them in the litigation pending here or elsewhere. If they should now apply to be let in as defendants, it ought probably to be permitted, unless their laches operate to prevent, but on such terms as to proceeding in the cause and the final hearing as would produce the least delay. If defendant Hunt has a claim for contribution from the estate of the bankrupt, the defendants or any of them, in case he is decreed liable in this suit, no reason is seen why he may not intervene in the bankruptcy proceedings as to such contingent claim, and have an order that will prevent the assets being distributed until his rights can be ascertained.

Petition denied.

In re The Southwestern Car Company.

UNITED STATES DISTRICT COURT—INDIANA.

Under the laws of Indiana, convicts may be hired in any number not exceeding one hundred in any one contract. The bankrupt entered into four separate contracts with the State for the employment of one hundred convicts under each contract. The contracts were all executed at the same time but were signed by different sureties. *Held*, That the execution of these contracts was not a violation of the letter or spirit of the statute, and that the contracts are valid and binding.

By the terms of the contracts the State was to keep the convicts under good discipline and to keep them at diligent and faithful labor for the bankrupt. This was not done. *Held*, That the loss and damage sustained by reason of the failure of the State to perform these stipulations should be deducted from the contract price in estimating the amount due to the State upon the contracts.

A claim of the State upon a contract for the employment of convicts is entitled to preference under Section 5101.

## *In re THE SOUTHWESTERN CAR COMPANY.*

THE facts appear fully in the opinion.

*James B. Meriwether*, for Andrew J. Howard, warden, etc.
*Alex. Dowling*, for assignee.

OPINION OF REGISTER.

The State of Indiana, by Andrew J. Howard, Warden of the State Prison (South), filed its claim and proof of debt against the estate of the bankrupt in the sum of twenty-eight thousand seven hundred and forty-four dollars and thirty-two cents, and asks that it be allowed and paid as a preferred debt under the terms of the third clause of Section 5101 of the Revised Statutes of the United States. Objections to the allowance and payment of this claim and proof of debt, or any part of it, were filed by the assignee and, upon his application, a re-examination thereof, under Rule 34 of the Supreme Court of the United States, was ordered and had. The evidence submitted upon this re-examination is herewith returned into court.

The claim is founded upon contracts between the claimant and the bankrupt for the labor of convicts in the State Prison (South) and there are three questions presented for consideration by the evidence, viz.:

1. Were the contracts authorized by the laws of Indiana?

2. Have the stipulations of the contracts been fully performed by the claimant, and, if they have not been fully performed, is the assignee in bankruptcy entitled to a recoupment in any sum on account of such partial performance?

3. Is the claim or any part of it entitled to priority of payment?

These questions are now considered in the order in which they are mentioned.

First: as to the legality of the contracts. The acts of the General Assembly of Indiana for the year 1857 provide (page 106): "Sec. 10, The convicts may be levied (or hired) in any number not exceeding one hundred in any one contract, in such manner as the directors, in their judgment, may consider to be most conducive to the interests of the State. All contracts for working convicts shall be given to the highest and best responsible bidder. The directors shall cause such notice to be given by publication of the time and place of letting to hire said convicts as they may deem most beneficial to the State. All contractors shall be required to give security to the State for the faithful performance of their contracts in such amount as directors, in their judgment, may think proper. In alloting convicts whose labor is thus contracted for, the warden shall do it in such manner as he shall consider will give the convict such knowledge of any mechanical art as will be most conducive to his (their) interests after his (their) discharge." The word "one" is omitted from the phrase "any one contract," in Davis's Revision of the Statutes, and the counsel for the assignee seems to have been misled by the omission. There were four separate contracts in this case, which were executed simultaneously, and, although the principal parties thereto are the same, they are not exact counterparts of each other, for they are not subscribed by the same sureties. None

of them is for the labor of more than one hundred convicts. In my opinion the execution of these contracts was not a violation or an evasion of either the letter or spirit of the statute. They do not contravene its express terms unless they are to be regarded as together forming a single contract for the labor of four hundred convicts. If this were true the sureties upon one of these contracts would be liable upon all of them, and this is clearly an untenable proposition. The statute does not prohibit more than one contract between the same parties, but the construction given it by the counsel for the assignee would operate as such a prohibition. There is no good reason why the State's contract with one party should be a bar to a subsequent contract with him, and, if separate contracts can be made with the same party a year, a day, or an hour apart, there is no good reason why they should not be made at the same time. To thus limit the authority of the prison officials would be, moreover, very injurious to the interests of the State. By placing restrictions of this sort upon its functionaries, it would not only exclude the larger industrial interests from competition for its convict labor, but, by lessening the number of competitors, it would diminish its value. On the other hand, it was equally for its benefit that the smaller industrial interests should not be excluded from competition for its convict labor, and, therefore, it enacted this statute which limits a single contract to the labor of not more than one hundred men. Without it, the larger and wealthier interests could have controlled the market, as they do almost everywhere; with it, the smaller interests are admitted to a more fair and even-handed competition with them, and the interests of the State are thereby promoted. The legislature was plainly governed, in the enactment of this statute, more by considerations of State policy than by the motives of philanthropy which are ascribed to them by the counsel for the assignee. In the law itself it is explicitly declared that the contract shall be made with reference to what "is most conducive to the interests of the State," and what "is most beneficial to the State." This is to be the primary object in *making the contract*, and the State exhibits its

regard for the interests of the convicts, *secondarily*, by directing that, *after the contracts are made*, the convicts shall be allotted by the warden "in such manner as he shall consider will give the convict such knowledge of any mechanical art as will be conducive to his interest after his discharge." For the foregoing reasons I find the contracts upon which this claim is founded were made according to the laws of Indiana.

Second: as to the full or partial performance of the contracts. The convicts were inexperienced; they had no previous knowledge of the work they were required to do. They were not let to the bankrupt as practical car-builders or chain-makers, or at the price such men can obtain for their work. The contract was for an inferior sort of labor, at a low rate of wages, and the bankrupt relied upon its ability to furnish the convicts with such instruction as would enable them to earn the price to be paid for their labor.

The value of this labor was further depreciated by another consideration. The laborers were lawless and unruly men who had been imprisoned by the State because the ordinary restraints of society had been insufficient to subdue their turbulent and vicious propensities. They could not be instructed in their work, and their work could not be had, without the continuous and vigilant presence and frequent application of physical force.

These were the necessary conditions of the labor that was furnished by the State and they operated to lessen its worth under the most favorable circumstances. Without the aid of the State, to make the convicts docile and tractable, their labor would have been entirely worthless, or, more properly, it could not have been obtained, for it was purely compulsory. Therefore these were important stipulations of the contract, viz.: "7th. The said party of the first part further agrees to keep said convicts under good discipline at the expense of the State, . . . . " and, "8th. Said convicts shall be kept at diligent and faithful labor for said party of the second part an average of ten hours a day through each year, Sundays ex-

cepted. . . ." This was the undertaking of the claimant and its performance would have been, no doubt, less difficult if the convicts had always been properly instructed and kept steadily at their work, as is urged by the counsel for the claimant and as is shown by some of the testimony. But their instruction and the supply of work by the bankrupt were not duties that it owed under the contract. They were duties to itself merely, by the neglect of which it suffered pecuniary loss as the only penalty. The contract itself provides, "if all or any of said convicts are idle on account of any default of said party of the second part they shall be paid for as though they were employed," and that is the end of it. But the duty of the claimant to repress disorder and turbulence, and to maintain the proper and necessary discipline in the prison was a duty of another sort. It was created by the contract, and it was an absolute duty. The claimant was not entitled to aid in its discharge from the bankrupt, and it was not absolved from its discharge by the bankrupt's acts or omissions. If the idleness of the convicts rendered the maintenance of order more arduous, it was for the claimant to remedy the evil by an appeal to its own resources. If one guard was not enough for the restraint of a given number of men, then its duty was to add more guards, until the force was sufficient for the purposes of its organization.

Now it is very evident from the testimony that the discipline in the State Prison (South) during a large part of the time covered by these contracts was not what the contract guaranteed. It was not "good," and the service rendered under it was not "diligent and faithful" when there was work to do. The truth is, it was very bad. This is shown by the positive testimony of many witnesses, and by the excuses which accompany the reluctant admissions of others. It is shown by a preponderance of the proof, and it is also shown that the bankrupt was injured thereby.

It is a rule of law that one may recover for services rendered or materials furnished under a special agreement which has been partly performed, an amount not exceeding the contract

price thereof, when the services or materials have been accepted and applied to the use and benefit of the other party to the agreement. The practical difficulty in such a case is to fix the valuation of what has been done or supplied; to determine the proper rate and method of measurement. According to the weight of authority in this State the amount that ought to be recovered for the partial performance of a contract for a specific undertaking, is the amount that remains after deducting from the contract price for the whole undertaking the sum necessary to complete it. The amount of recovery is not, therefore, the actual value of the services or materials, but it is the remainder, after deducting from the price fixed by the contract for the entire services or materials the loss or damage sustained by the failure to fully render the one or furnish the other according to the terms of the contract, and this loss or damage is the amount necessary to procure other services or materials of the same character and quality. (3 Ind., 59, 3 Ind., 72, 3 Ind., 148.)

The loss or damage in this case results from the failure of the claimant to perform one of the stipulations of the contract as to the maintenance of proper discipline, and it consists in a diminished productiveness. It is shown by the testimony that the productiveness of the convict labor was reduced in this way one-third during the greater part of the time included within the terms of the claim in controversy. No other damage being shown, this must be accepted as the sole measure of that sustained by the bankrupt, and the claimant cannot object to this mode of estimating its amount. The claimant thus receives the contract price for as much labor as was actually furnished, and, under the decisions of our Supreme Court, this is the maximum that may be recovered upon the partial performance of a contract. I find, therefore, that the amount of recovery in this case ought to be a sum one-third less than the contract price for the period of time beginning August 1, 1873, and ending on June 15, 1875; or, in other words, two-thirds of the amount claimed therefor, and that the same has been fully paid.

Third: as to the rank and priority of this claim. The Revised Statutes of the United States provide,

"Sec. 5101. In the order for dividend the following claims shall be entitled to priority, and to be first paid in full in the following order:

. . . . . .

"Third. All debts due to the State in which the proceedings in bankruptcy are pending and all taxes and assessments made under the laws thereof."

This is clearly a "debt due to the State," but it is urged by the counsel for the assignee that it is not the intention of the Bankrupt Law to *create* priorities; that its intention is to recognize their existence only when they have been already created by the laws of a State or the United States. The Bankrupt Law does, however, create a priority in this State when it provides, in the same section: "Fourth. Wages due to any operative, clerk, or house-servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy," shall be entitled to priority of payment. According to the argument of the counsel, the provision is applicable only to a State like Pennsylvania, where the wages of operatives are entitled to preference by its own laws; and neither the third nor the fourth clause of Section 5101 is applicable to a State like Indiana, where neither debts due the State, of the sort under present consideration, nor the wages of operatives, are preferred by its laws. This special and limited application of the Bankrupt Law would be destructive to its uniformity, and Congress has no power under the constitution to provide any but a *uniform* system of bankruptcy. Congress has recognized and reaffirmed many existing priorities by this section, no doubt, but it has gone beyond this point and, in language whose meaning is unmistakable, made them common and universal wherever the law operates. It would have been an act of supererogation for Congress to have merely provided that priorities which already exist shall be protected in bankruptcy, for this has been repeatedly held

to be the law independently of any express provision of the Bankrupt Law. It was so held as to the claims of the United States in the case cited by the counsel, and it is upon precisely the same principles of reasoning that priorities created by the laws of the States are protected. The assignee receives the estate of a bankrupt subject to all the liens and equities thereon. It is true that Congress has declared that certain priorities created by the laws of the State are violations of the Bankrupt Law, and that as such they shall be set aside in bankruptcy, but this really proves the rule, for it is only when they are set aside by *its express terms* that this protection is refused. This rule of law is stated very fully in *Re* Brand (3 N. B. R., 324), quoted by the counsel. The court says:

"It is a well-settled principle that the assignee of a bankrupt takes his estate subject to all the liens against the same, as well as the equities existing against it. The assignee merely succeeds to the rights of the bankrupts, and is affected by all limitations imposed by law against the bankrupt's estate antecedent to his accepting the trust. Courts in bankruptcy invariably respect *bona fide* liens obtained against a bankrupt anterior to his adjudication as a bankrupt, if not within the prescribed period." It may be added that the quotation from this opinion of the court in the brief of the counsel refers exclusively to the laws of West Virginia, and not to the Bankrupt Law. In my opinion the debt due the claimant is entitled to priority of payment under the provisions of Section 5101 of the Revised Statutes of the United States.

There is no controversy as to the claimant's performance of these contracts for the period of time beginning June 15, 1875, and ending January 10, 1876, and I find that there is due thereon for this period the balance of seven thousand nine hundred and forty-four dollars and sixty-nine cents.

I find upon the whole that the claim and proof of debt of the State of Indiana, by Andrew J. Howard, etc., in the sum of twenty-eight thousand seven hundred and forty-four dollars and sixty-three cents, ought to be reduced to the sum of seven thousand nine hundred and forty-four dollars and

sixty-nine cents, and that it ought to be allowed and paid in the sum last aforesaid as a preferred debt of the third class under the provisions of Sec. 5101, Revised Statutes of the United States.

NOBLE C. BUTLER, *Register in Bankruptcy.*

GRESHAM, J.—The register's report is in all things approved.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

MARCH 4, 1880.

**Whatever money or property is in the possession of the bankrupt at the time of filing his petition, which he is actually using and holding as his own, passes to his assignee in bankruptcy; and he cannot set up in defence to the claim of the assignee a title in a third person merely for the purpose of holding on to it himself.**

## *In re SIMON MOSES.*

THE facts appear fully in the opinion.

*G. A. Seixas*, for creditors.
*F. R. Lawrence*, for bankrupt.

CHOATE, J.—This is an application on the part of creditors of the bankrupt by petition to compel the bankrupt to deliver to the assignee certain moneys and property alleged to be in his possession at the time of filing his petition in bankruptcy, but not delivered to his assignee. The bankrupt has answered, denying that he had any such money or property, and he now objects to any further proceedings and moves to discharge the petition, on the ground that upon the case as stated in the petition the assignee in bankruptcy has no title or claim to the property, but that if the bankrupt still holds it it belongs to his assignee under a voluntary assignment for the benefit of creditors executed before the filing of the petition in bankruptcy. The case made by the petition is shortly thus: The

general assignment for the benefit of the creditors was executed December 19, 1877. The petition in bankruptcy was filed June 27, 1878. At and prior to the making of the general assignment, the bankrupt had a large amount of money and personal property which, with the knowledge and connivance of his voluntary assignee, and to defraud his creditors, he was permitted to use as his own in continuing his business. That part of his property, if any, which he did deliver to the voluntary assignee, was delivered in form only, and really remained subject to the control and use of the bankrupt in his business, the assignee permitting the moneys to be deposited in a bank account opened in his name as assignee and to be drawn out by or for the use of the bankrupt and for the bankrupt's own business purposes. The bank account of the assignee was in this case made a mere blind for creditors. This state of things continued till the assignee died, having rendered no account and having to his credit in bank only about five hundred dollars. A new assignee has, since his death, been appointed by the court having jurisdiction of the trust, on the application of the present petitioners. The moneys and property now alleged to be in the hands of the bankrupt are the proceeds and result of the business so carried on, or perhaps partly the very money which the bankrupt failed to deliver to his voluntary assignee.

Upon this case I am clearly of opinion, if the facts shall be established by the evidence, that the bankrupt should be compelled to pay over and deliver the money and property to the assignee in bankruptcy. Whatever money or property is in the possession of the bankrupt at the time of filing his petition, which he is actually using and holding as his own, passes to his assignee in bankruptcy, and he cannot set up in defence to the claim of the assignee a title in a third person merely for the purpose of holding on to it himself. If third persons have the possession, this court cannot on summary petition order it to be delivered to the assignee. But if the bankrupt has it, it passes to the assignee subject to the liens or rights of third persons whatever they may be. After the assignee gets the

property any third person may by petition or suit assert his right in it. If the bankrupt has property which he is using as his own, the court will not be curious to inquire how he came by it. The case of *In re* Beal (2 N. B. R., 587) is directly in point and was not so strong a case for the creditors as the present. In that case Judge Lowell says: "The question is one of fact whether this bankrupt had, at the time of his bankruptcy, any estate or effects which he has concealed. If he had such *de facto*, though by a defeasible title, he must set them out in his schedules and give them to his assignee; it is not for him to rely on the title of a third person which he has not himself respected. The presumption is that he surrendered all his property in 1866; but that is a presumption of fact, and if he did not, it is not important whether his motives were good or bad, whether his acts were done with the counsel or concurrence, or against the will of his then assignees and in fraud of their rights. The possession of assets in the use and enjoyment of the bankrupt makes a sufficient title for his assignee, until the earlier assignees shall dispute it."

Let an order be entered referring it to the register to take the proofs.

## UNITED STATES CIRCUIT COURT—E. D. PENNSYLVANIA.

AUGUST 15, 1879.

If a transfer by one partner to another of his interest in the firm is made in good faith it is valid, and the firm creditors who have no lien on the property or equity therein independent of the partners cannot complain.

Executions issued on judgments which were entered on warrants signed and delivered a year before the petition in bankruptcy was filed are valid, and the hold on the property under them is good unless the debtor has actively interfered to have the seizures made.

Where such warrants were held by near relations of the debtor, and it appeared that the debtor had stated to creditors that they could make nothing by pushing, as his relations had judgments and he should protect them first, and also that his relations entered their judgments and issued executions thereon immediately on learning the debtor s condition, *Held*, That the executions were procured by the debtor, although he did not communicate directly with the persons in whose favor they were issued.

A warrant for judgment was delivered to a bank one month before the peti-

tion was filed. It did not appear that the bank had reasonable cause at the time to believe the debtor to be insolvent, or knowledge that the act was in fraud of the Bankrupt Law. *Held*, That the judgment and execution issued thereon were valid.

## *SHIMER, Assignee*, v. *HUBER et al.*

MOTION to restrain proceedings on four executions.

On April 30, 1877, a petition on the part of firm creditors of the firm of Huber and Mohr was filed in the District Court for the Eastern District of Pennsylvania, on which they were adjudged bankrupts.

On April 24, 1877, three executions had been issued against C. Lewis Huber, one of the members of this firm, out of the Court of Common Pleas of Lehigh County. One by Walter P. Huber, guardian of Chas. T. Ritter, for two thousand dollars, dated April 14, 1874, and entered of record April 24, 1877; one by Rebecca Wagner dated April 1, 1874, entered of record April 24, 1877, for three thousand eight hundred and seventy-nine dollars, and one by Milton Cooper, dated December 7, 1875, entered of record April 24, 1877, for fifteen hundred dollars. There was also another execution, issued by the Coopersburg Savings Bank on April 28, 1877, on a judgment note dated March 29, 1877, and entered of record in the Court of Common Pleas of Lehigh County, April 2, 1877. The last judgment was against C. Lewis Huber and Thomas Mohr. On April 30, 1877, this bill was filed, praying for an injunction against these execution creditors and against the sheriff of Lehigh County. The Coopersburg Savings Bank was brought in on a subpœna subsequently issued on application of the plaintiffs.

Walter P. Huber is a brother, Mrs. Rebecca Wagner, a sister, and Milton Cooper, the father-in-law, of C. Lewis Huber.

Before the formation of this partnership, C. Lewis Huber was in partnership with C. Wilson Dech and T. J. Kichline, trading in the firm name of Huber, Dech & Kichline. They carried on a boot and shoe factory at Allentown, Pa. About the 1st of June, 1876, the firm of Huber, Dech & Kichline

was dissolved. The stock was then valued at about twenty thousand dollars.

Thomas Mohr, one of the bankrupts, then took a half interest in the business, and C. Lewis Huber the other half, and they entered into a copartnership, trading in the firm name of Huber & Mohr.

It appears that on the 29th of March, 1877, the firm of Huber & Mohr was dissolved. Mohr transferred his half interest to Huber, who assumed the firm liabilities.

At the time of this dissolution the firm was practically insolvent, but the transaction was *bona fide*, and Huber then expected to be able to carry it through, although he was also personally insolvent at the time, though this fact was not known to Mohr. Subsequently, being aware of his insolvent position, C. Lewis Huber intimated to certain of his private creditors that he proposed to make an assignment. As a result of such intimation, judgment notes, the warrants of which were signed and delivered a year prior to the petition in bankruptcy filed against Huber & Mohr, held by his brother, Walter Huber, his sister, Rebecca Wagner, and his father-in-law, Mr. Cooper, being all personal claims, were entered up, executions issued, and levy made upon the stock of the late firm within a month previous to the petition in bankruptcy filed by the firm creditors. The judgment to the Coopersburg Savings Bank had been confessed by the firm of Huber & Mohr prior to the dissolution, but no knowledge was shown on the part of the bank of the insolvency.

*Winslow Wood* and *Jas. S. Biery*, for complainants.
*P. K. Erdman*, and *R. E. Wright & Son*, for respondent.

BUTLER, J.—Three questions are presented by this case: First, did the agreement of March 29, 1879, between the partners, Huber & Mohr, transfer the firm property to Huber as against the firm creditors? Second, were the seizures under the executions of Walter Huber, Mrs. Wagner, and Mr. Cooper, procured by the debtor, Lewis Huber? Third, is the judgment

of the Coopersburg Savings Bank, of April, 1877, valid, and, if so, was the seizure under *it* procured by the debtor?

The first question is one of *good faith*, simply. If the transaction was honest—designed for the purpose stated in the agreement signed—it transferred Mohr's interest to Huber; and the firm creditors having no lien on the property, or equity in respect thereto, independent of the partners, cannot complain. The insolvent condition of the firm at the time is unimportant, except as the fact may bear on the question of good faith. (Parsons on Partnership, 502, note L.; Lindley on Partnership, *535; *McNutt* v. *Strayhorn*, 3 Wright, 269; *Doner* v. *Stauffer*, 1 Pen. & W., 198; *Baker's Appeal*, 9 Harris, 76; *Walker* v. *Eyth*, 1 Casey, 216; *Siegel* v. *Chidsey*, 4 Casey, 279; *York County Bank's Appeal*, 8 Casey, 446; *Cope's Appeal*, 3 Wright, 284; *Vandike's Appeal*, 7 Smith, 9; *Lefevre's Appeal*, 19 Smith, 122; *Potter, Assignee*, v. *Hicks et al.*, Circuit Court, E. Dist. Penn., 1878.) An examination of the evidence has satisfied us that the transaction was honest. that Mohr sold his interest to Huber in good faith for the consideration stated in the agreement. The firm was insolvent according to the sense in which this term is used in the Bankrupt Law, we have no doubt; they could not meet their ordinary business obligations. But Huber, a hopeful, energetic, visionary man, believed his individual resources equal to all contingencies, and supposed he could prosecute the business successfully. In this opinion Mohr (who believed Huber had considerable separate property) fully concurred. Huber went to work earnestly, borrowed money, involving his father-in-law to a considerable amount; but the burden was too heavy, and very soon he sank under it.

Second, were the executions of Walter Huber, Mrs. Wagner, and Mr. Cooper, procured by the debtor, Lewis Huber? The judgments on which the executions issued having been entered in pursuance of warrants signed and delivered a year before the petition in bankruptcy was filed, are valid; and the hold on the property under them is good, unless the debtor actively interfered to have the seizures made. An examination

of the evidence has satisfied us that he did so interfere. The burden of proof is on the plaintiff; and we approached the case with a natural inclination in favor of the execution creditors, whose judgments are not only honest, but for money loaned; but the testimony tending to show an arrangement that the debtor should interfere to save these creditors, if danger threatened, at the expense of others, is too strong to be disregarded. That he should be inclined to prefer them, may be presumed; they were his near relations; that he informed them of his condition, and that they, in consequence, and in a body, seized his property, is clearly proved. In the absence of repelling evidence, an inference that his motive in thus informing them was to induce the action they took, and that he did it in pursuance of an understanding, would be justified. But there is more in the case. Mr. Deck, a creditor, testifies that Huber told him, when pressing for payment, months before, "that suing would do no good; that he had money of his brother, sister, and father-in-law; that he would not leave them out in the cold." Mr. Wood, who called about a claim, as counsel, testifies that Huber told him substantially the same; "that his sister, brother, and father-in-law had judgments; that his creditors could gain nothing by pushing; that if they pushed he would have his relations sell him out; that they would use up the whole stock; that these debts were sacred, and he thought it his duty to protect them first." And Walter Huber, one of the execution creditors, says he would have entered his judgment earlier had it not been for Lewis' statement that it would injure him, and a promise to tell him when danger approached; "I relied on this; that is the reason I did not enter it sooner; I entered it the next morning after he told me he was going to make an assignment." The business connected with these claims was attended to by Walter Huber and Mr. Cooper. They resolved to issue all the executions immediately upon learning the debtor's condition, and did issue them. It is unimportant that Lewis may not have communicated directly with Mrs. Wagner. We cannot regard the denials of the parties to the transaction as a sufficient answer to this evidence.

Third, is the judgment of the Coopersburg Savings Bank valid, and if so, was the execution which issued on it procured by the debtor? The warrant on which this judgment was confessed was signed within a month of filing the petition in bankruptcy. That the debtor was then "insolvent," as before remarked, cannot be doubted. Knowledge of this fact on his part, and an intention to prefer the bank in confessing the judgment, may, therefore, justly be inferred. But we fail to discover any evidence to warrant a conclusion that the bank had reasonable cause to believe him insolvent, or knowledge that his act was in fraud of the Bankrupt Law, without which the insolvency and improper motives of the debtor are unimportant. Mere suspicion of insolvency or fraud will not answer. (*Grant* v. *National Bank*, 17 N. B. R., 498, 7 Otto, 80.) The officers say they believed him to be solvent, and the fact that they discounted his note at this time, supports their statement. The judgment must therefore be regarded as valid. And we find no evidence whatever that the debtor procured the execution which issued upon it. He had no motive to do so, such as existed in the other cases; and the testimony before referred to as applying there is inapplicable here.

A decree will therefore be entered, enjoining and restraining Milton Cooper, Walter Huber, and Rebecca Wagner, their respective agents, servants, and attorneys, from proceeding under their aforesaid executions against the property of C. Lewis Huber, seized as before mentioned, or in anywise interfering or intermeddling with the same, or the proceeds thereof, as prayed for, and dismissing the bill as respects the Coopersburg Savings Bank.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

MARCH 9, 1880.

**Where the specifications against a discharge are for wilfully and corruptly omitting a certain item from the schedule and wilful false swearing to the truth of the affidavit annexed thereto, the granting of a discharge is**

not a determination of the question whether or not such item is an asset of the estate.

After his discharge the bankrupt cannot be compelled, by summary order, to execute writings and instruments to enable the assignee to demand and recover the assets of the estate.

## *In re JAMES R. NICHOLS.*

THE facts appear fully in the opinion.

*Alex Thain*, for motion.
*Knox & Woodward*, contra.

CHOATE, J.—This is an application to compel the bankrupt to execute necessary instruments to enable the assignee to make available as assets of the bankrupt's estate a seat in the New York Stock Exchange, held by the bankrupt at the time of the filing of his petition. More than three years before this petition was made the bankrupt was discharged.

He has now appeared by counsel and takes the objection that since his discharge he is not subject to the summary jurisdiction of the court, nor can he be compelled by an order in the bankruptcy proceedings to execute writings or instruments to enable the assignee to demand, recover, and receive the property assigned. He also claims that in this case it was determined by the court that the seat in the Stock Exchange was not property to which the assignee is entitled.

This decision is claimed to have been made in passing on the application of the bankrupt for his discharge. An examination of the record, however, shows that the specifications of the opposing creditors were for wilfully and fraudulently omitting this item from his schedule, wilfully swearing falsely to the truth of that affidavit annexed to the schedule which omitted this asset, and wilfully swearing falsely, in his examination, that he had no other property than that named in the schedule. It is evident that the overruling of these specifications was not proved and the granting of the discharge was not a determination of the question whether or not the seat was an asset of the estate in bankruptcy. The charges were of *wilful and fraudulent concealment, and wilful false swearing.* And it is clear

that to find these charges proved, the court must have been satisfied that the bankrupt, *knowing* and *believing* that the seat was property to which his creditors were entitled, intentionally omitted it from his schedule, and wilfully swore falsely about it. The objection that the question is *res adjudicata*, must, therefore, be overruled.

The objection that the bankrupt is liable to the summary order of the court, such as is now asked for, only before his discharge, is, I think, well taken. Revised Statute, Section 5104, provides: "The bankrupt shall at all times until his discharge be subject to the order of the court, and shall at the expense of the estate execute all proper writings and instruments and do all acts required by the court, touching the assigned property or estate, and to enable the assignee to demand, recover and receive all the property and estate assigned, wherever situated. For neglect or refusal to obey any order of the court, the bankrupt may be committed and punished as for a contempt of court." This was part of Section 26, in the original act. By Section 14, which defined the title and powers of the assignee, it was also provided, that, "The debtor shall also at the request of the assignee, and at the expense of the estate, make and execute any instruments, deeds, and writings, which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt." This is re-enacted in the Revised Statutes as Section 5051. In the case of *In re* Dole (9 N. B. R. 193, 11 Blatch., 499) it was held that the summary power of the court to compel the bankrupt to submit to examination under Section 26 was limited to the time prior to his discharge, and that the discharge was the termination of the proceeding so far as he is concerned. The argument is still stronger against the exercise of the summary power to compel the execution of papers after the discharge, because this part of the Section contains the words "until his discharge," which seem designed to limit this very power. The provision cited above, from Section 14, does not enlarge the power of the court. The provision in Section 26 is evidently intended to give a remedy for enforcing the duty imposed on the bankrupt by Section 14,

which declares it to be his duty to execute all such necessary instruments at the request of the assignee. Construing them together as parts of a single law, they are, it would seem subject to the same limitation, that the act required to be done, is to be done during the pendency of the proceeding, and before the discharge. The use of the word "debtor," instead of "bankrupt," in Section 14, is relied on as giving that Section a more liberal construction. But I cannot see how it has any such force. After his discharge the former bankrupt is no longer a "debtor," any more than he is a "bankrupt."

Whether in a suit in equity the assignee can now have any relief against the former bankrupt to compel his aid, if required in realizing the value of this asset, it is unnecessary to determine. Having failed to ask within the time limited by the statute for the summary aid of the court for the purpose, he cannot have any relief in this form.

Motion denied.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

APRIL 8, 1880.

**A rehearing, or new trial of specifications against a discharge is not authorized by Section 5120, after the discharge has been granted, even if the opposing creditor can adduce new facts.**

## *In re WILLIAM S. CORWIN.*

THE facts appear fully in the opinion.

*Starr & Hooker*, for petitioner.
*H. E. Howland*, for bankrupt.

CHOATE, J.—This is a petition under R. S., Section 5120, to vacate the discharge of the bankrupt. It was filed within two years after the discharge was granted. It appears by the petition that these petitioners filed specifications in opposition to the discharge, which were tried and resulted in a decision in favor of

the bankrupt. The petition sets forth, as grounds for avoiding the discharge, some of the same specifications only. It also alleges facts which, if true, tend to show that certain acts of the bankrupt since he obtained the discharge, would, if the trial of the specifications were now had, be competent evidence in proof of the specifications. The petition does not allege that the petitioners had no knowledge of the acts alleged in the specifications as grounds for avoiding the discharge before the same was granted.

The bankrupt has appeared and objects that the petition states no case against him under Section 5120 which he should be required to answer.

I think it is clear that Section 5120 does not authorize a rehearing or new trial upon specifications heard and determined before the discharge, even if the opposing creditor can adduce new facts, even the conduct of the bankrupt, which would be competent evidence in case of a new trial happening since the the discharge, or a discovery since the discharge of the new evidence tending to support the specification. The evident purpose of Section 5120 was to give creditors who had failed to oppose the discharge, for the reason that they had no knowledge before the discharge that the grounds now alleged for opposing it existed, an opportunity within two years to make the necessary charges and to prove them. The privilege given is not so broad as the right to a new trial on newly discovered evidence. And I think it cannot be claimed that a creditor who before the discharge filed specifications setting forth by way of charge against the bankrupt fraudulent acts, had no knowledge of those acts. He necessarily had such knowledge of them that he was able to allege them in good faith and upon such information as justified him in doing so. This section does not provide that the creditor must have had no knowledge of all the evidence which may be produced to support the charges, but no knowledge of the fraudulent acts charged. It is based on the theory, that, if the creditor knows of the fraudulent acts, then, with the power given by the act to examine the bankrupt himself and to produce the testimony,

he has sufficient opportunity to prove them so as to defeat a discharge; but if he has no knowledge whatever of the facts his failure to file specifications is excused and he will be heard to make the charge afterward within two years. This seems to me to be a reasonable construction of the Section. Any construction in effect conferring a right to a new trial as between the same parties upon the same case before tried, upon newly discovered evidence, would take from the discharge, as it seems to me, that finality—except as to creditors really having no knowledge whatever of the evidence of valid grounds for opposing the discharge—which it was clearly intended to have.

Petition dismissed.

## UNITED STATES SUPREME COURT.

### OCTOBER TERM, 1879.

A conveyance of land as a settlement made by a husband, free from debt, directly to his wife, without the intervention of trustees, is valid.
The fact that such a conveyance reserves a power of revocation and appointment to other uses does not impair its validity.
Such a power does not pass to the assignee in bankruptcy.

### *JONES, Assignee*, v. *CLIFTON et al.*

THE facts appear fully in the opinion.

FIELD, J.—This is a suit to set aside two deeds executed by Charles H. Clifton to his wife, and to compel a transfer of the property embraced in them to his assignee in bankruptcy. Clifton married in 1870, and was possessed at the time of a large estate. Previously to his marriage he had taken out three policies of insurance on his life, each for ten thousand dollars. Soon after his marriage he took out two additional policies on his life, each for the same amount as the previous ones. In October, 1872, by his deed-poll, he conveyed to his wife, in consideration of the love and affection he bore her, to hold as her separate estate, free from his control, use, and

benefit, a small parcel of land in the city of Louisville, in the State of Kentucky, and by the same instrument, upon the like consideration, and to be held for the same separate use of his wife, he assigned to her the five policies of insurance on his life. The deed contained a clause reserving to himself the power to revoke the grant and assignment, in whole or in part, and to transfer the property to any uses he might appoint, and to such person or persons as he might designate, and to cause such uses to spring or shift as he might declare.

In April, 1873, by another deed-poll, he conveyed to his wife, upon like consideration of love and affection, to hold as her separate estate, free from his control, use, or benefit, two other parcels of land; one consisting of a lot in the city of Louisville, Kentucky, and the other his country place in the county of Jefferson, in that State, comprising thirty-eight acres. The instrument contained a reservation of a power of revocation and appointment to other uses similar to that of the first deed, the power of appointment, however, being somewhat fuller in providing for its execution either by deed or writing, to take effect as a devise under the statute of wills in Kentucky.

These deeds were properly acknowledged and recorded in the counties where the real property was situated. At the time of their execution the grantor was not in any business, and did not intend engaging in any; was worth about two hundred and fifty thousand dollars, and owed only a few inconsiderable debts, which were soon afterward paid. The deeds were made at the urgent solicitation of his wife, who perceived that his habits were those of an indiscreet young man, somewhat inclined to dissipation, and she was naturally desirous of providing against a possible waste of his property.

In 1873 a general financial panic passed over the country; the values of all kinds of property greatly depreciated in the market, and land in the country could scarcely be disposed of at any price. By the shrinkage in values and losses in the subsequent years of 1874 and 1875, by his being surety for others, and by bad management, his estate was wasted, and he became

hopelessly insolvent. In December, 1875, upon his petition, he was adjudged a bankrupt by the District Court of Kentucky. The complainant was subsequently appointed assignee of his effects, and received an assignment of his property. The proved debts against him amounted to thirteen thousand dollars, and his estate in the hands of the assignee was of little value.

The assignee seeks to set aside the deeds upon various grounds, which, however, may be embraced in the following: 1st. That they are void because made directly to his wife, without the intervention of a trustee, and so passed no interest to her; 2d. That by the reservation to the grantor of a power of revocation and appointment to other uses, they were designed to hinder and defraud his future creditors, whilst he retained the control and enjoyment of the property; and 3d. That the power of revocation and appointment were assets which passed to the assignee in bankruptcy, and can be executed by him for the benefit of creditors.

The questions thus presented, though interesting, are not difficult of solution. The right of a husband to settle a portion of his property upon his wife and thus provide against the vicissitudes of fortune, when this can be done without impairing existing claims of creditors, is indisputable. Its exercise is upheld by the courts, as tending not only to the future comfort and support of the wife, but also, through her, to the support and education of any children of the marriage. It arises, as said by Chief Justice Marshall in *Sexton* v. *Wheaton*, as a consequence of that absolute power which a man possesses over his own property, by which he can make any disposition of it which does not interfere with the existing rights of others. In that case the husband had purchased a house and lot within the District of Columbia, and taken the conveyance in the name of his wife, and had afterward made improvements upon the property. Subsequently he became involved in debt, and his creditors having obtained a judgment against him, filed a bill to subject this property to its payment, contending that the conveyance to the wife was fraudulent and void as to them, and praying that if the conveyance were upheld the wife

might be compelled to account for the value of the improvements. But the court held, after an extended consideration of the authorities, that as the husband was at the time free from debt, the conveyance was to be deemed a voluntary settlement upon her; and as it was not made with any fraudulent intent, it was valid against subsequent creditors, and that the improvements upon the property stood upon the same footing as the conveyance, it appearing that they had been made before the debts were contracted. (8 Wheat., 229.) That case does not differ in principle from the one before us. The husband in this, as in that one, was free from debt when he made the deeds, which were voluntary settlements upon his wife. It cannot make any substantial difference that in the case cited the money of the husband was expended in the purchase of the property, and the conveyance was taken in the name of the wife; and that in the present case the property was owned at the time by the husband, and was transferred directly by him to her. The transaction, in its essential features, would have been the same as now if the husband had sold his lands and invested the proceeds in other property, and taken a conveyance in her name. The circuity of the proceeding would not have altered its character, nor affected its validity. In all cases where a husband makes a voluntary settlement of any portion of his property for the benefit of others who stand in such a relation to him as to create an obligation, legal or moral, to provide for them, as in the case of a wife, or children, or parents, the only question that can properly be asked is, does such a disposition of the property deprive others of any existing claim to it. If it does not, no one can complain if the transfer be made matter of public record and not be designed as a scheme to defraud future creditors. And it cannot make any difference through what channels the property passes to the party to be benefited, or to his or her trustee, whether it be by direct conveyance from the husband or through the intervention of others. The technical reasons of the common law arising from the unity of husband and wife, which would prevent a direct conveyance of the property from him to her for

a valuable consideration, as upon a contract or purchase, have long since ceased to operate in the case of a voluntary transfer of property as a settlement upon her. The intervention of trustees in order that the property conveyed may be held as her separate estate, beyond the control or interference of her husband, though formerly held to be indispensable, is no longer required. This has been established in courts of equity, says Story, for more than a century, so "that whenever real or personal property is given, or devised, or settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectuated in equity, and the wife's interest protected against the marital rights and claims of her husband, and of his creditors also." (Equity Juris., Sec. 1,380.) And he adds to this observation that "it will make no difference whether the separate estate be derived from her husband himself or a mere stranger; for, as to such separate estate, when obtained in either way, her husband will be treated as a mere trustee, and prohibited from disposing of it to her prejudice." There is nothing in the circumstances attending the execution of the deeds in this case which should prevent the full application of the doctrine stated for the protection of the wife's interest against the claim of the assignee for the benefit of the creditors of the husband. (*Lloyd* v. *Fulton*, 91 U. S., 479.)

The powers of revocation and appointment to other uses reserved to the husband in the deeds in question do not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made. Indeed, such reservations are usual in family settlements, and are intended "to meet the ever-varying interests of family connections." (*Riggs* v. *Murray*, 2 John. Ch., 565.) So frequent is the necessity of a change in the uses of property thus settled, arising from the altered condition of the family, the addition or death of members, new occupations or positions in life, and a variety of other causes which will readily occur to every one, that the absence of a power of revocation and of appointment to other uses in a deed of family

settlement has often been considered a badge of fraud, and, except when made solely to guard against the extravagance and imprudence of the settler, such settlements have, in many instances, been annulled on that ground. Several of them are cited in the very able and learned opinion of the district judge who presided in the Circuit Court when this case was there heard. The law in England, by which property can be kept in the same families for many years, has, perhaps, caused greater importance to be given in that country than in this to the insertion in deeds of settlement of a power of revocation and appointment to other uses. Here the absence of the reservation is only a fact to be explained, and is to have more or less weight according to the circumstances of each case. In the case before us the husband does not appear to have had his attention drawn to the reservation. He desired to have the property settled upon his wife, and he entrusted the preparation of the deed to his counsel. There was clearly no fraudulent intent on his part; no proof of any such intent was produced or stated to be in existence. The only fraud asserted in argument to exist is constructive fraud, arising from the reservation in question. But its presence in the deed, as is clear from all the authorities, does not tend to create an imputation upon his good faith and honesty in the transaction. (*Huguenin* v. *Baseley*, 14 Vesey, 273; *Coutts* v. *Ackworth*, L. R., 8 Eq., 558; *Wollaston* v. *Tribe*, L. R., 9 Eq., 44; *Everitt* v. *Everitt*, L. R., 10 Eq., 405; *Hall* v. *Hall*, L. R., 14 Eq., 365; *Phillips* v. *Mullings*, L. R., 7 Ch. Appeals, 244; *Hall* v. *Hall*, L. R., 8 Ch. Appeals, 430; *Toker* v. *Toker*, 3 De Gex, Jones & Smith, 456.)

As is very justly observed in the opinion of the court below, the insertion of the power of revocation and new appointment, so far from proving that the grantor contemplated a fraud upon his future creditors, tends to show the contrary. Should he revoke the settlements the property would revert to him, and, of course, be liable for his debts; and should he exercise the power of appointment for the benefit of others, the estate appointed would be liable in equity for his debts.

The title to the land and policies passed by the deeds; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will. The grantor could, indeed, exercise the power either by deed or will, but he could not vest the power in any other person to be thus executed. Nor is the power a *chose* in action. It did not, therefore, in our judgment, constitute assets of the bankrupt which passed to his assignee.

Decree affirmed.

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UNITED STATES DISTRICT COURT—OREGON.

JUNE 12, 1880.

**E. conveyed certain property in fraud of his creditors, and afterward certain creditors of the firm of E. & C. obtained judgments against said firm and docketed the same; then the firm and members thereof were adjudged bankrupts and the assignee brought suit against the grantee in the fraudulent conveyance to have the same set aside and obtained a decree to that effect, whereupon the property was sold by the assignee, free from the liens of such judgments, if any, and the proceeds brought into court for distribution. *Held*, (1) That the lien of such judgments only attached to the property then *belonging* to the judgment debtor; (2) that the conveyance passed all the estate of the grantor in the premises to the grantee, qualified only by the right of the creditors to subject the same to the payment of their debts, in the manner and time prescribed by law; and, (3) that therefore the lien of the judgments did not attach to the premises, and the proceeds of the sale thereof are the separate estate of E. and must be first equally applied to the payment of his separate creditors.**

## *In re ESTES & CARTER.*

PETITION to apply certain assets in payment of individual debts. The facts appear fully in the opinion.

*Erasmus D. Shattuck*, for the assignee.

*Charles H. Woodward* and *William W. Page*, for the judgment creditors.

DEADY, J.—On July 19, 1877, Levi Estes and Charles M. Carter were, by this court, adjudge dbankrupts, both as partners

constituting the firm of "Estes and Carter," and as individuals. On May 4, 1876, Estes was the owner of the undivided one-half of lots three and four in block thirty-nine in this city, and being insolvent, conveyed the same, subject to a mortgage thereon of ———, to William H. Cole, with intent to hinder, delay, and defraud his creditors. On December 22, 1879, the Circuit Court for this district, in a suit brought for that purpose by the assignee of the bankrupts against said Cole, gave a decree setting aside and annulling said conveyances as fraudulent. Afterward, the assignee, upon the order of this court, sold the property free from all liens, if any, except that of the mortgage aforesaid, for the sum of seven thousand six hundred dollars.

Claims, amounting in the aggregate to nineteen thousand four hundred and ninety-eight dollars and nineteen cents, have been proved against the joint estate of the partners and the individual estate of Estes—seven thousand five hundred and forty dollars and six cents unsecured, eight hundred and thirty-six dollars and fifteen cents arising upon judgments against the latter, and six thousand seven hundred and sixty dollars and sixteen cents unsecured, and four thousand three hundred and sixty-one dollars and eighty-two cents arising upon judgments against the partnership. Besides these, claims amounting to two thousand eight hundred and thirty-six dollars and fifteen cents, but secured by mortgage upon other property, have been proved against Estes. The judgments were all given and docketed after the conveyance to Cole. There are no assets of the partnership, but the assets of Estes' estate amount to six thousand six hundred and sixty-eight dollars and ninety-one cents, six thousand dollars of which will probably be applicable to the payment of debts.

The assignee, on behalf of certain individual creditors of Estes, filed a petition setting forth the fact of the conflicting claims upon this fund, and asked for an order directing it to be applied exclusively upon the individual debts of Estes, without regard to the supposed lien of any judgment.

The petition was referred to the register, when the judg-

ment creditors of the partnership, George Ham, Smith Bros. & Co., H. L. Darr, A. Watts, and John H. Moore demurred to the same upon the ground that on the facts stated the petitioners were not entitled to the relief asked, because the judgments of said creditors were a lien upon the individual property of Estes which the fund in the hands of the assignee represents. By consent the register made a pro forma ruling upon the demurrers and the matter was certified into court and here argued by counsel.

Counsel for the judgment creditors insist that the judgments given against Estes, whether jointly with Carter or alone, were a lien upon the property conveyed by the former to Cole, notwithstanding such conveyance, and the lien now exists against the proceeds thereof in the hands of the assignee.

The argument in support of this proposition assumes that, notwithstanding the previous conveyance to Cole, the property as to these judgment creditors at the date of the entry and docket of their judgments still *belonged* to Estes, an therefore it became and was subject to the lien of said judgments; and upon the correctness of this assumption the case turns.

On the other hand counsel for the assignee contend that at the date of the judgments in question, Estes, having already conveyed the premises to Cole by a deed valid and operative as between the parties thereto, had no interest in the premises —that they in no sense belonged to him and therefore the liens of said judgments could not affect or include them.

The Or. civ. code, Sec. 266, provides, that—

From the date of the docketing of a judgment, . . . such judgment shall be a lien upon *all the real property of the defendant* within the county or counties where the same is docketed, or which he may afterward acquire therein, during the time an execution may issue thereon." By Secs. 273, 279, it is further provided, that an execution against property may be levied upon "the real property belonging to him (the judgment debtor) on the day when the judgment was docketed in the county or at any time thereafter;" and "All property or

passes to his assignee in bankruptcy; and he cannot set up in defence to the claim of the assignee a title in a third person merely for the purpose of holding on to it himself. 412

Shimer, Assignee, *v.* Huber et al.

If a transfer by one partner to another of his interest in the firm is made in good faith it is valid, and the firm creditors who have no lien on the property or equity therein independent of the partners cannot complain.

Executions issued on judgments which were entered on warrants signed and delivered a year before the petition in bankruptcy was filed are valid, and the hold on the property under them is good unless the debtor has actively interfered to have the seizures made.

Where such warrants were held by near relations of the debtor, and it appeared that the debtor had stated to creditors that they could make nothing by pushing, as his relations had judgments and he should protect them first, and also that his relations entered their judgments and issued executions thereon immediately on learning the debtor's condition, *Held*, That the executions were procured by the debtor, although he did not communicate directly with the persons in whose favor they were issued.

A warrant for judgment was delivered to a bank one month before the petition was filed. It did not appear that the bank had reasonable cause at the time to believe the debtor to be insolvent, or knowledge that the act was in fraud of the Bankrupt Law. *Held*, That the judgment and execution issued thereon were valid. 414

*In re* James R. Nichols.

Where the specifications against a discharge are for wilfully and corruptly omitting a certain item from the schedule and wilful false swearing to the truth of the affidavit annexed thereto, the granting of a discharge is not a determination of the question whether or not such item is an asset of the estate.

After his discharge the bankrupt cannot be compelled, by summary order, to execute writings and instruments to enable the assignee to demand and recover the assets of the estate. 419

*In re* William S. Corwin.

A rehearing, or new trial of specifications against a discharge is not authorized by Section 5120, after the discharge has been granted, even if the opposing creditor can adduce new facts. 422

Jones, Assignee, *v.* Clifton et al.

A conveyance of land as a settlement made by a husband, free from debt, directly to his wife, without the intervention of trustees, is valid.

The fact that such a conveyance reserves a power of revocation and appointment to other uses does not impair its validity.

Such a power does not pass to the assignee in bankruptcy. 424

*In re* Estes & Carter.

E. conveyed certain property in fraud of his creditors, and afterward certain creditors of the firm of E. & C. obtained judgments against said firm and dooketed the same; then the firm and members thereof were adjudged bankrupts and the assignee brought suit against the grantee in the fraudulent conveyance to have the same set aside, and obtained a decree to that effect, whereupon the property was sold by the assignee, free from the liens of such judgments, if any, and the proceeds brought into court for distribution. *Held*, (1) That the lien of such judgments only attached to the property then *belonging* to the judgment debtor; (2) that the conveyance passed all the estate of the grantor in the premises to the grantee, qualified only by the right of the creditors to subject the same to the payment of their debts, in the manner and time prescribed by law; and, (3) that therefore the lien of the judgments did not attach to the premises, and the proceeds of the sale thereof are the separate estate of E. and must be first equally applied to the payment of his separate creditors. 430

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# SYNOPSIS OF CASES—No. 10.

Warford, Assignee v. Noble et al.

Under the law of Indiana, a widow is entitled to one-third of all real estate of which her husband may have been seized during coverture, in which prior to his death she may not have joined in a conveyance with him in due form of law; and also to one-third of all the real estate in the same manner in which her husband had an equitable interest at the time of his death.

By the act of March 11, 1875, it is declared that in all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, unless, by the judgment of the court, that interest is sold, or barred, it becomes absolute in a married woman, the same as in the case of the death of the husband.

The Supreme Court of Indiana, having declared that a deed to an assignee in bankruptcy is within the terms of the act of 1875, *Held*, That where there was, at the time of the petition in bankruptcy filed, an equitable interest in the bankrupt which passed to the assignee, that the widow, under the law of Indiana, was entitled to one-third of that equitable interest absolutely as against the rights of the creditors represented by the assignee. 440

*In re* McEwen et al.

An appeal from an order entered in the District Court, sitting as a court of bankruptcy, should be entered in the Circuit Court within ten days after such appeal is taken, although the Circuit Court is in session at the time the order is made and continues so up to the end of the ten days. 445

*In re* Hicks, Stewart & Rosenberg.

The register has no power, on the mere application of creditors, to issue a summons for the examination of a trustee appointed pursuant to Section 43 of the Bankrupt Act, or for the production by him of the books and vouchers pertaining to the trust.

The trustee can only properly be called to account on a petition addressed to the court, setting forth the grounds on which the court is asked to intervene, to which the trustee will have an opportunity to interpose objections before an order will be made against him.

The provisions of Sections 5003 and 5087 do not apply to cases where a trustee has been appointed under Section 43. 449

*In re* McBride et al.

A United States revenue officer must account to the Government, in lawful money, for all sums received by him as such officer. And, if he make good to the Government, by payment, the amount of a dishonored check which he had received from a Government debtor, he is a guarantor on behalf of such debtor, of a most meritorious character, and will be entitled to be subrogated to all the rights of a guarantor in any proceeding to collect the amount. 453

right or interest therein of the ment debtor," not specially exempted, "shall be liable to an execution."

Section 51 of Chap. 6, relating to conveyances, which is substantially a copy of Chap. 5 of 13 Elizabeth, provides, among other things, that every conveyance of any estate in lands, "made with the intent to hinder, delay, or defraud creditors of their lawful . . . demands . . . as against the person so hindered, delayed, or defrauded, shall be void." (Gen. Laws, p. 523.)

To show that a judgment is a lien upon land previously conveyed in fraud of creditors, counsel cite Bump on F. C., 465; *Pratt* v. *Wheeler* (6 Gray, 520); *Scully* v. *Kearns* (14 La. An., 436); *Eastman* v. *Schettler* (13 Wis., 324); *Jacoby's Appeal* (67 Penn., 434); *Manhattan Co.* v. *Evertson* (6 Paige Ch., 457); *Smith* v. *Ingles* (2 Or., 43).

In *Pratt* v. *Wheeler* (*supra*) the point in controversy was not decided. That case only determines that a deed in fraud of creditors is void as against the attachment of any of such creditors. The deed being void as to creditors, it is merely a question of procedure whether a creditor shall attack it in equity by a bill to set it aside or by process at law, as an attachment or execution against the property covered by it. In Massachusetts, the courts did not possess equity jurisdiction until a late date, and the proceeding by attachment or execution, to assert the right of a creditor against the property of a debtor, covered by a fraudulent conveyance, became and is common.

But whether the mere lien of a judgment, which results from the docketing of the same, can be used or have the effect of process by means of which a creditor can assert his right against a fraudulent conveyance, is another and very different question.

All this and more may be said of the case of *Scully* v. *Kearns* (*supra*). This was a case of a "simulated" or sham sale of personal property in fraud of creditors, and the court only held that the judgment creditor of the pretended vendor was not bound to proceed specially to have the sale set aside,

but might treat it as so far void and levy upon the property as that of the judgment debtor.

*Eastman* v. *Schettler* (*supra*) does contain a dictum to the effect that a judgment obtained against a debtor who has already conveyed his property in fraud of his creditors is, notwithstanding such conveyance, a lien thereon, but the only point *decided* in the case was that the purchaser of such property, at a sale upon such judgment, succeeded to the right of the judgment creditor, and might therefore assail such conveyance in the same manner as such creditor.

In *Jacoby's appeal* (*supra*) there was a contest between two judgment creditors for the proceeds of property sold upon the process of the junior of them, the same having been conveyed prior to the judgments by the judgment debtor in fraud of his creditors. The court, upon the authority of *Hoffman's appeal* (8 Wright, 95), in which it was said that it was "the estate of the debtor which was sold at the sheriff's sale, and therefore the liens upon it which attached after the fraudulent grant must be paid in their order," gave the proceeds to the prior judgment creditor.

In *Manhattan Co.* v. *Evertson* (*supra*) it was held, that as between the mortgagee, in a mortgage to secure a previous debt, executed by the grantee in a fraudulent conveyance, and the judgment creditors of the grantor in such conveyance, the lien of the latter should prevail. The citation from Bump on F. C. is fully to the effect, that in such cases, in contemplation of law, the title remains in the debtor, and that judgments against him become liens upon such property, precisely as if no transfer had been made.

But this statement of the law is based, among others, upon the foregoing cases, and it is clear that with the exception of the last two, they do not support the text.

In addition to these authorities, I find that Judge Hoffman, in *Re* Beadle (5 Saw., 351), has held in favor of the lien under circumstances similar to those in this case.

The syllabus of the case states the facts and the ruling sufficiently. It is—"Where an insolvent made an assignment

to trustees, with intent to hinder and delay his creditors, which assignment was by this court subsequently adjudged void, and trustees conveyed the property to the assignee in bankruptcy; *Held*, That the latter took the property subject to the liens of creditors who had recovered and docketed judgments subsequently to the fraudulent conveyance and before the commencement of the bankruptcy proceedings."

In the course of the opinion of the court this question is asked—"Could the judgment creditors, by docketing their judgments against the grantor, acquire a lien on the land without previously bringing their bill in equity to set aside the fraudulent conveyance?" and the answer given is—"This question must be settled by the law of this State; and it appears to have been settled ever since the case of *Hager* v. *Shindler* (29 Cal., 47), that a conveyance of this description may be treated by the judgment creditor as absolutely void *ab initio*, and as if non-existent."

But it does not appear that any question concerning the operation or effect of the *lien* of a judgment arose or was decided in *Hager* v. *Shindler*.

That was a case where the purchaser of real property at a sheriff's sale, upon an execution to enforce a judgment against one who had, prior to the judgment, conveyed the premises in question in fraud of his creditors, brought a suit to annul such conveyance as a cloud upon his title, and the court held that the suit could be maintained. Nothing was claimed under or by virtue of the lien of the judgment. Indeed the statement of the ruling in *Hager* v. *Shindler*, by the court in *Re* Beadle shows this. It is—"In that case it was held that the purchaser of land at a sheriff's sale may maintain a bill to set aside and annul as a cloud upon the title a deed of the land given before the judgment by the judgment debtor without consideration and to defraud creditors."

And the subsequent cases of *Ferris* v. *Irving* (28 Cal., 645), and *Stewart* v. *Thompson* (32 Cal., 260), referred to by the court, and particularly the concurring opinion of Judge Sawyer in the latter case, are only to the same effect—that the

conveyance is void as to the creditor who may attack it and divest the grantee of his right under it by a sale upon an execution against the grantor in favor of such creditor.

To justify this conclusion it was not necessary that there should be any judgment lien in the case, or even that the judgment should ever have been docketed. The seizure and sale upon the execution was a direct and legal assertion of the creditor's right to treat the conveyance as void, and the conveyance by the sheriff to the purchaser invested the latter with the title to the premises, and these California cases only decide, that the purchaser, as such, and as the successor in right of the judgment creditor, could maintain a suit to set aside the fraudulent conveyance as a cloud upon this title, without first bringing ejectment for the possession.

On the other hand, in *Miller* v. *Sherry* (2 Wall., 237), which was a controversy concerning the title to real property between parties claiming under two judgments given against the debtor after he had conveyed the premises in fraud of his creditors, and the subsequent proceedings in equity to subject the premises to the satisfaction of said judgments, the court held that the proceedings in equity on the part of the senior judgment creditor were insufficient to affect the title, and decided in favor of the party claiming under the proceedings on creditor's bill of the junior judgment creditor.

In delivering the opinion of the court Mr. Justice Swayne says that after the conveyance the legal title was in the grantee thereof until divested by the decree on the creditor's bill; and as if it was too plain for argument, assumes and states that the judgments were not a lien upon the premises.

Speaking of the senior judgment he says: "It is not contended that the judgment was a lien on the premises. The legal title having passed from the judgment debtor before its rendition, by a deed valid as between him and his grantee, it could not have that effect by operation of law."

In *Rappelye* v. *International Bank* (9 Reporter, 469), decided in the Supreme Court of Illinois (February 4, 1880), a trust deed made to defraud creditors was avoided at the suit of

the defendant, which thereupon claimed and obtained a priority in the payment of its judgment from the proceeds of the land thus conveyed by the debtor. The court held, in the language of the syllabus, that:

"A conveyance, fraudulent as to creditors, is binding on the grantor, so that there is no estate, legal or equitable, remaining in him, on which a judgment lien could attach. The lien only attaches on the avoiding of the deed by the creditor, so that he who thus avoids the deed has the prior lien."

In *Smith* v. *Ingles* (2 Or., 44) it was held that the lien of a judgment does not extend to an equity or an equitable title. The case was this: Ingles purchased real property, and for the purpose of defrauding his creditors took the conveyance to his minor children. Burns, a judgment creditor of Ingles, sold the property upon an execution as the property of the latter, and became the purchaser thereof. Subsequent to the entry and docketing of this judgment, Ingles mortgaged the premises to Smith, and after the sale Smith brought suit to enforce the lien of his mortgage, making Burns a party. The court held that the lien of Burns' judgment did not affect the property.

As the law of the State is the law of this case, it is claimed that the ruling in *Ingles* v. *Smith* is the decision of this question in favor of the assignee.

The case is not clear in some points, but, upon authority, the transaction was not a conveyance by the debtor in fraud of his creditors within the statute, and therefore void, but a purchase by Ingles in the name of others with a fraudulent intent. This being so, as to the creditors, equity would hold the grantees in the conveyance to be the trustees of a resulting trust in favor of Ingles, and subject the trust estate to the payment of his debts. (Bump on F. C., 237; *Guthrie* v. *Gardner*, 19 Wend., 414.)

In this view of the matter the case is scarcely in point. The legal estate was never in Ingles, and the case only decides that the lien of the judgment against him did not affect his resulting trust or equity in the premises. But in the case under consideration, Estes, at the date of docketing these judgments,

had the legal estate in the premises, or nothing. In the language of the court in *Rappelye* v. *International Bank* (*supra*): "It is a mistaken notion that after the making of a fraudulent conveyance as to creditors, there remains in the fraudulent grantor an equitable estate in the land conveyed. If this were so, he could sell and convey to another such estate."

It is also claimed that the statute limiting the lien of a judgment in *Smith* v. *Ingles* was more restricted than the present. But I think they are substantially the same. The former (Gen. Laws 1853-4, p. 100) declared that "such lien shall extend to all the real property of the judgment debtor, *owned by him* at the time of docketing the judgment," etc. From the present one there is only omitted the tautology—"owned by him,"—the expression, "property *of* the judgment debtor" being considered the full equivalent thereof.

So stand the authorities pro and con upon this subject. Of those which are controlling in this court—the one from the Supreme Court of this State—*Smith* v. *Ingles*—decides that the lien of a judgment does not extend to an equity, while the other one from the Supreme Court of the United States—*Miller* v. *Sherry*—decides that such lien does not attach at all in the case of a previous conveyance in fraud of creditors.

In my own opinion, the lien of a judgment which is limited by law *to the property of, or belonging to the judgment debtor* at the time of the docketing, does not nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another, by deed valid and binding between the parties.

A conveyance in fraud of creditors, although declared by the statute to be void as to them, is nevertheless valid as between the parties and their representatives, and passes all the estate of the grantor to the grantee. And a bona fide purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. (Or. Gen. Laws, p. 523; *Bean* v. *Smith*, 2 Mason, 252; *Rappelye* v. *International Bank*, *supra*.)

Such a conveyance is not, as has been sometimes supposed, "utterly void," but is only so in a qualified sense. Practically, it is only *voidable*, and that at the instance of creditors proceeding in the mode prescribed by law, and even then, not as against a bona fide purchaser. (*Bean* v. *Smith*, *supra*, 274; *Wood* v. *Mann*, 1 Sum., 506; Bump on F. C., 451.)

The operation of the lien of a judgment being limited by statute to the property then belonging to the judgment debtor, is not a mode prescribed, by which a creditor may attack a conveyance, fraudulent as to himself, or assert any right as such against the grantor therein. This lien is constructive in its character, and is not the result of a levy or any other act directed against this specific property. It is the creature of the statute and cannot have effect beyond it. (*In re* Boyd, 4 Saw., 262–70.) By that, its operation and effect are restrained to the property then owned by the debtor. But the conveyance from Estes to Cole deprived the former of all interest in this property. No judgment against Estes nor any act of his could reach it or affect it.

Therefore, when the judgments of these joint creditors were obtained and docketed, the property did not belong to him, and was not for that reason within the operation of their liens. On the contrary it belonged to Cole, qualified by the right of the creditors, in the manner and time prescribed by law, to subject it to the payment of their debts.

In the suit against Cole to set aside this fraudulent conveyance the assignee represented the creditors. (*Bradshaw* v. *Klein*, 1 N. B. R., 542; 2 Biss., 20.)

It is also claimed by the assignee that the fund obtained by that suit—the proceeds arising from the sale of the property—is equitable assets and should be distributed equally among the creditors. (*Silk* v. *Prime* and notes; 2 Lead. Cas. Eq., 82; *Benson* v. *LeRoy*, 4 John. Ch., 651.) But this distribution was subject to any specific, legal lien or priority that might exist in favor of any creditor. (*Purdy* v. *Doyle*, 1 Paige, 558; *Codwise* v. *Gelston*, 10 John., 507). In this last case Ch. Kent says:

"If a fund for the payment of debts be created under an order or decree in chancery, and the creditors come in to avail themselves of it, the rule of equity then is, that they shall be paid in *pari passu*, or upon a footing of equality. But when the law gives priority, equity will not destroy it, and especially where legal assets are created by statute, they remain so though the creditors be obliged to go into equity for assistance." But it is not necessary to invoke the doctrine of equity in this case, as the bankrupt act preserves all legal liens, and furnishes a certain and just rule for the distribution of the assets of a partnership and the members thereof. (Secs. 5075, 5121, R. S.) By this rule the property of the partnership is to be first applied to the payment of partnership debts, and the property of each member thereof to the payment of his individual debts.

Whether the proper application of this rule would exclude the lien of a judgment obtained against the members of the firm for a partnership debt, from the property of the individual partner, as contended by counsel for the assignee, it is not necessary now to consider.

Having arrived at the conclusion that none of the judgments in this case were a lien upon the property in question, the proceeds of the sale are individual assets, and under the bankrupt act must be first applied to the payment of Estes' individual debts; and it is so ordered.

## UNITED STATES CIRCUIT COURT—INDIANA.

MARCH, 1880.

Under the law of Indiana, a widow is entitled to one-third of all real estate of which her husband may have been seized during coverture, in which prior to his death she may not have joined in a conveyance with him in due form of law; and also to one-third of all the real estate in the same manner in which her husband had an equitable interest at the time of his death.

By the act of March 11, 1875, it is declared that in all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, unless, by the judgment of the court, that inter-

est is sold, or barred, it becomes absolute in a married woman, the same as in the case of the death of the husband.

The Supreme Court of Indiana, having declared that a deed to an assignee in bankruptcy is within the terms of the act of 1875, *Held*, That where there was, at the time of the petition in bankruptcy filed, an equitable interest in the bankrupt which passed to the assignee, that the widow, under the law of Indiana, was entitled to one-third of that equitable interest absolutely as against the rights of the creditors represented by the assignee.

## *FRANKLIN WARFORD, Assignee of William F. Noble,* v. *ELIZA NOBLE et al.*

THE facts appear fully in the opinion.

*Mr. Claypool*, for appellant.
*Mr. Norton* and *Mr. Roberts*, for appellees.

DRUMMOND, J.—This is a bill filed by the assignee of William F. Noble, for the purpose of removing a cloud from the title of a certain tract of land, of which the bankrupt was the owner at the time the petition in bankruptcy was filed.

It is alleged in the bill that Mrs. Noble, the wife of the bankrupt, claims an interest in the land by virtue of her marriage with the bankrupt, and claims that the act of 1875, when the property was transferred to the assignee, operated upon it, so as to make her interest in the land absolute.

The law of Indiana in relation to the right of the wife to the estate of which her husband was seized during marriage, and in which he had an equitable interest, was as follows: "A surviving wife is entitled to one-third of all the real estate of which her husband may have been seized in fee simple at any time during the marriage, and in the conveyance of which she may not have joined in due form of law. And also of all lands in which her husband had an equitable interest at the time of his death."

With that law in force, the act of March 11, 1875, was passed, which declares "that in all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the

wife in the same manner and to the same extent as such inchoate interest of married women now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vest in the purchaser thereof, his heirs and assigns, subject to the provisions of this act and not otherwise."

The property of the bankrupt having been transferred under the bankrupt law to the assignee, that has been declared by the Supreme Court of this State to be a judicial sale within the meaning of this act of the Legislature, and so the act operates upon the interest which the husband may have had in real property.

The difference between the interest which the husband has is, that where he is seized of real estate, the right of the wife cannot be divested without her consent. When he has merely an equitable interest in land, he has the right to dispose of it at any time during his life. At the time of the bankruptcy, the bankrupt had an equitable interest in a tract of land in the county of Hamilton, in this State. It was a tract of school land, which had been sold in conformity with the laws of this State, and a certificate of purchase had been given which had been transferred by the purchaser to various parties, and finally had come by purchase into the possession of the bankrupt. Under the law of this State he had taken possession of the property, and had resided on it for a considerable time. The purchase was originally made in 1839. There was due upon the certificate of purchase, in order to consummate the title in the bankrupt, seven hundred dollars, which, of course, before a perfect title could be obtained, must be paid, and the bankrupt having this equitable interest, the assignee made an application to the court for leave to raise the necessary amount to pay what was due. This was granted, and the money was raised, and the balance due on the land was paid by the assignee, thus entitling the purchaser, or whoever had the right under the certificate, to a perfect title to the land from the State.

The contention on the part of the wife is, that by virtue of the act of 1875, her right became consummated, the property having been sold under a judicial sale, and that is the question involved in the case. I think, under the general law of this State, that she is entitled to one-third of the interest which her husband had in this property at the time of this judicial sale, precisely as though he had died; and in this respect I differ from the district judge.

What does the language mean: "In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage?" The District Court thought the term "inchoate" was one applicable to a case where the husband had an absolute title, a complete seizin in the land, and that it did not apply to a case where there was merely an equitable interest, because in the one case the right of the wife could not be divested without her consent, and in the other it was in the power of the husband at any time to deprive her of her right; the language of the statute being express that she is only vested with the right to an equitable estate which her husband may own at the time of his death. But I am inclined to think the term is applicable to both kinds of estate, as well to the equitable interest as to the absolute interest in fee simple. Does it cease to be an inchoate interest simply because the husband has the power of disposition over the land? I think not. It seems to me that where a married man has an equitable interest merely in land, that under the general law of this State, and within the meaning of this particular statute, it may be truly said that the wife has an inchoate interest in the land by virtue of her marriage, because if the husband retains that interest up to the time of his death, the inchoate right becomes consummated. The only qualification is that he can deprive her of the right by disposing of the land.

Now, the statute of 1875 intended to place the rights of married women upon the same footing in case of a judicial sale as if the husband had died. An inchoate interest means an imperfect interest—one that is begun and not completed.

Take the case of those States where the wife has only the right of dower in land of which the husband dies seized, and of which he has the absolute title, it has always been considered in such cases that although the husband can deprive the wife of her right of dower by disposing of the property, still her right has been admitted, and called an inchoate right of dower. And so in this State; the right which the wife has in lands—an inchoate interest, as it is called—in any equitable claim which the husband may have, although he can deprive her of it, still it is an interest which becomes vested and complete if the husband dies holding an equitable claim, or if disposed of by judicial sale. And it seems to me to be the duty of the court to give a liberal construction to these statutes for the benefit of married women. The law of this State does not give dower to the wife in the ordinary meaning of the term—that is to say, it does not give a life interest in one-third of the real property of the husband, but gives her an absolute estate in one-third of the real estate of the husband, in the manner heretofore stated.

This case is a strong illustration of the propriety of such a construction. This is a case where the husband took possession of the property with the wife, remaining on it for many years, cultivating it and making it their home, and yet, if the wife has no interest in the land, she is deprived of what would be her ordinary right under the law of this State.

There is another question proper for the court to consider, and that is the fact that this was a case of bankruptcy where, in one sense, it may be said that the whole estate which the bankrupt owned belonged to his creditors; and inasmuch as it was necessary to raise out of the assets of the estate a sufficient sum in order to pay the balance which was due, and that belonging to the creditors, it should go for their benefit.

There is a law of this State which provides that if the husband shall have made a contract for lands, and at the time of his decease the consideration, in whole or in part, shall not have been paid, but after his death the same shall be paid out of the proceeds of his estate, the widow shall have one-third

of said land, in the same manner as if the legal estate had vested in the husband during the coverture; and it may be said, I think, with a great deal of force, that this judicial sale being substantially the same thing, so far as the rights of the wife are concerned, as the death of the husband, that the right of the wife in a case like this should be protected in the same way as if the husband had actually died and the proceeds of the estate had been used for the purpose of paying any balance that might be due.

In this case the balance was paid out of this very property —that is, the money was raised out of this property by the assignee, and it may be said, I think, that the wife ought to contribute her quota, or it should be deducted from the amount which has to be paid. In other words, she should bear her proportion of the share which is due on the property; but that, of course, can be arranged in the settlement of the various questions that exist in this case. If the property shall be sold, the proceeds will be held for the benefit of the creditors of the bankrupt's estate, and also for the benefit of the wife, so far as she may be entitled to protection under the law.

The decree of the District Court will be reversed, and a decree prepared in conformity with the opinion of this court.

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## UNITED STATES CIRCUIT COURT—INDIANA.

MARCH, 1880.

**An appeal from an order entered in the District Court, sitting as a court of bankruptcy, should be entered in the Circuit Court within ten days after such appeal is taken, although the Circuit Court is in session at the time the order is made and continues so up to the end of the ten days.**

### *In re WILLIAM McEWEN et al.*

THE facts appear fully in the opinion.

DRUMMOND, J.—This is a motion to dismiss two appeals that have been taken in a bankruptcy case from orders of the Dis-

trict Court, disallowing certain claims against the estate of the bankrupts.

The facts are, that the order disallowing these claims was made by the District Court on November 27, 1879. That order seems to have been made in the absence of counsel for the claimant, and on an application to the court on December 17, 1879, the court opened the orders and reconsidered the cases for the purpose of allowing the parties to take an appeal to the Circuit Court, reforming its orders in both cases. An appeal was taken from that order on December 17th, and there was no question about the appeal being taken in the proper time, and the bond being given so as to consummate that appeal. The appeal was taken during the term of the court. In fact, the term of the court still continues.

The objection on the part of the assignees to this appeal is, that the appellants did not comply with the law of Congress in entering their appeal in the Circuit Court within ten days from the time the order was rendered. The question is, Whether that should have been done?

The contention between the two parties is, on the part of the assignees, that the appeal should be entered in the Circuit Court if the court is in session at the time the order is entered, and continues up to the end of the ten days, during the court, although it is the same term. On the other hand, it is claimed by the appellants that it is sufficient if the appeal is entered in the Circuit Court at the succeeding term after the order entered.

I am of the opinion that the true construction of the acts of Congress and of the rules of the Supreme Court on the subject is, that the appeal should be entered in the Circuit Court within ten days after the appeal is taken, although the Circuit Court is in session at the time the order is made and continues so up to the end of the ten days.

It is necessary to recur to the language of the original Bankrupt Act on this subject: "No appeal shall be allowed in any case from the District to the Circuit Court, unless it is claimed, and notice given thereof to the clerk of the District

Court, to be entered with the record of proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from." "Such appeal shall be entered at the term of the Circuit Court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same."

The only difference between the language and that now found in the Revised Statutes as a part of the Bankrupt Law, is that the word "first" is left out in the revision; but that clearly cannot make any difference in the sense. "The appeal shall be entered at the term of the Circuit Court which shall be held within and for the district next after the expiration of ten days from the time of claiming the same," means precisely the same as though it were "first held within and for the district," because it is claimed that the word "next" gives significance to the sentence, and it means the term succeeding that at which the order is entered next after the expiration of ten days. (See Sections 4981 and 4982, R. S. U. S.)

The true meaning, I take it, is, that if the Circuit Court is in session more than ten days after the order is made, the appeal shall be then entered. That is the term, within the meaning of the law, next after the entering of the order.

This is the twenty-sixth rule made by the Supreme Court under that law: "Any supposed creditor who takes an appeal to the Circuit Court from the decision of the District Court, rejecting his claim in whole or in part, according to the provisions of Section 8 of the act, shall give notice of his intention to enter the appeal within ten days from the entry of the final decision of the District Court upon his claim; and he shall file his appeal in the clerk's office of the Circuit Court within ten days thereafter, setting forth a statement, in writing, of his claim, in the manner prescribed by said section." The Supreme Court gave a construction of the statute by enacting that rule, and it would seem as though, in that way only, can we carry out the object which the Bankrupt Law had in view.

Now, take this district. The court, by statute, only sits

twice a year, once in May and once in November, and it certainly could not have been the intention of Congress in such a case that there should be an interval of six months or more, as there might be, before the entry of an appeal should be made in the Circuit Court, and therefore the Supreme Court, in considering the statute, required that the appeal should be entered in the Circuit Court within ten days after the order made by the District Court.

If it is to be entered at the succeeding term, and if the words "next after the expiration" from the time of claiming the same, mean the succeeding term, then of course there is no significance to be given to the word "first." Perhaps, on that account, it was omitted in the revision.

The statute has been construed in other cases (in *Wood* v. *Bailey*, 12 N. B. R., 132, 21 Wallace, 640; *In re* Coleman, 2 N. B. R., 671, 7 Blatch., 192), in which the court held that after the claim of a creditor of a bankrupt's estate was rejected by the District Court, and an appeal taken from the decision of the District Court, he must enter his appeal within ten days in the Circuit Court, and comply with order No. 26, and that he must also set forth a statement in writing, etc. This has been the law ever since the statute was enacted, and Section 4984 of the Revised Statutes requires that, upon entering his appeal in the Circuit Court, the appellant shall file with the clerk a statement of his case and the amount claimed in his declaration. In the case in 7 Blatchford, the appeal was dismissed because the entry was not made accordingly. And the point is decided in the same way in *In re* Place & Sparkman, (4 N. B. R. 541). And unless the omission of the word "first" in the revision changes the meaning of the law as it was originally enacted, then these decisions are in point. And although the last are not absolutely controlling in this court, still I think it must be considered the true construction of the act; it is especially the construction which the Supreme Court has placed upon the original Bankrupt Law, and I do not think the omission of the word "first" changes that construction.

So the appeals will be dismissed in both cases.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

MAY 28, 1880.

The register has no power, on the mere application of creditors, to issue a summons for the examination of a trustee appointed pursuant to Section 43 of the Bankrupt Act, or for the production by him of the books and vouchers pertaining to the trust.

The trustee can only properly be called to account on a petition addressed to the court, setting forth the grounds on which the court is asked to intervene, to which the trustee will have an opportunity to interpose objections before an order will be made against him.

The provisions of Sections 5002 and 5087 do not apply to cases where a trustee has been appointed under Section 43.

## *In re HICKS, STEWART & ROSENBERG.*

THE facts appear fully in the opinion.

*G. H. Crawford* and *C. E. Souther*, for creditors.
*James Dunne*, for trustee.

CHOATE, J.—This case comes up on a certificate from the register, requiring the opinion of the court upon the following facts stated: This was a proceeding wherein the estate of the bankrupts has been wound up by a trustee under the direction of a committee of creditors, pursuant to Section 43 of the Bankrupt Act. No schedules were ever filed in the case; no reports have been made to the register; no account has been rendered, except one dated December 31, 1879, which has been submitted to the committee, and by them confirmed. It shows, or purports to show, the receipts and disbursements of the trustee, including amounts paid for expense of administration and for dividends, and an undistributed balance of three thousand five hundred and forty-nine dollars and forty-four cents. The trustee has never been examined under any order of the court, the account rendered by him to the committee is not verified, nor was it accompanied by vouchers.

Two of the creditors, whose debts together amount to about two-thirds of all the debts proved, applied to the register for an order for the examination of the trustee, and accordingly

the register issued a summons, requiring the trustee to appear for examination and to produce upon such examination all books of account belonging to the bankrupts, and all the books kept by him as trustee, and all his vouchers. The questions certified by the register are (1) whether the register had power to issue the summons; (2) whether these applying creditors had the right to examine the trustee in this proceeding before the register, pursuant to the summons; and (3) whether they have the right on such examination to call for the production of said books and papers.

It has been held that after the due appointment of a trustee under Section 43 of the Bankrupt Act the rights and powers of creditors inconsistent with the full and free exercise of the power and authority given by the statute to the trustee to settle and wind up the estate under the direction of the committee are taken away. (*In re* Jay Cooke & Co., 11 N. B. R., 1.) And in the case of *In re* Trowbridge (9 id., 274) it was said by Judge Longyear: "The proceeding contemplated by Section 43 is evidently intended to be one by arrangement, and not by judicial process or proceedings. The power and jurisdiction of the court are, however, retained over the matter, in order that it may interfere whenever it may become necessary for the preservation and enforcement of the rights of all parties concerned. The committee of creditors represents the entire body of the creditors, and its acts and doings are their acts and doings. All the details of the winding up and settlement of the estate are carried on through and by the trustee and committee. By arrangement and amicable adjustment, and until some dispute or other exigency arises which cannot be settled and disposed of in that way, none of the processes, powers, or jurisdiction of the court are brought into requisition, and they can be set in motion only by a special application for that purpose." I think it is clear upon these authorities, and upon the terms of the statute, that the trustee and the committee are not liable to the ordinary processes and modes of proceedings prescribed by the Bankrupt Law for the regulation of assignees and for the enforcement of those obligations

which assignees assume towards creditors and the bankrupt. At the same time the statute sanctions and these cases recognize the power and duty of the court to intervene upon cause shown, for the purpose of preventing a violation of their trust on the part of the trustee or creditors, and to secure the equal rights of all creditors in the distribution of the assets, which is expressly provided for in the Act. The most common cause for the interference of the court is upon a question being made as to whether or not a person making a claim is entitled to share as a creditor. Such a question, if mooted and not adjusted by the parties, must necessarily be determined by the court. In this very case such questions have been so determined in favor of the applying creditors. So there can be no doubt that any action of the trustee or committee in excess of their lawful powers, as, for instance, a diversion of funds to a purpose not authorized by the terms of their trust, will be corrected on application to the court. (*In re* Bonnett, 19 N. B. R., 309.) Nor does the trustee, any more than any other trustee, hold the funds of the estate without a liability to be called to an account. As a trustee for creditors he is probably bound to afford them on request all proper information as to performance of his trust. There is nothing, however, in the statute or in the general principles of law governing the subject prescribing that his account rendered to the creditors shall be under oath, or in any particular form, or that when it is rendered his vouchers shall accompany it. While the approval of the committee will be conclusive as to all matters that are within the discretion of the trustee and committee, except in case of bad faith, the approval of the committee cannot affect or cure positively unlawful applications of the fund, nor irregularity of distribution among creditors. (*In re* Baxter, 19 N. B. R., 295.) That this court has authority in proper cases to call the trustee to an account is unquestionable; but I think it equally clear that it can properly be done only on a petition by a creditor or other party in interest, setting forth the grounds on which the court is asked to intervene in the matter, to which the trustee will have an opportunity, by an-

swer or otherwise, to interpose objections before an order can properly be made against him. I think it clear that any other or more summary mode of proceeding against him would be inconsistent with his relations to the court and the creditors established by the statute. If such proceedings are taken and an accounting ordered, the powers of the court are ample to direct a personal examination of the trustee under oath, and the production of all books and papers necessary for the full elucidation of his accounts. But it follows from the views above expressed that the register had no power, on the mere application of creditors, to issue a summons for the examination of the trustee, or for the production by him of the books and papers mentioned in the summons. Section 5087 provides that the court may require the attendance of any person as a witness in a bankruptcy proceeding, either before the court or before a register, and by Section 5002 registers are vested with the same powers as the court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents. This summons was no doubt issued upon the theory that these Sections still applied in this case, notwithstanding the appointment of the trustee. They are applicable to ordinary proceedings in bankruptcy. For the reasons stated above they are superseded and made inapplicable to this case by the adoption of the alternative method of winding up the estate through the agency of a trustee and committee of creditors.

The questions submitted by the register must all be answered in the negative.

## UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

JULY 1, 1878.

**A United States revenue officer must account to the Government, in lawful money, for all sums received by him as such officer. And, if he make good to the Government, by payment, the amount of a dishonored check which he had received from a Government debtor, he is a guarantor on**

behalf of such debtor, of a most meritorious character, and will be entitled to be subrogated to all the rights of a guarantor in any proceeding to collect the amount.

## *In re JAMES G. McBRIDE, CALEB IVES, and SETH L. CARPENTER.*

THE register certified that on the 25th day of January, 1878, Charles R. Wing proved on behalf of, and in the name of the United States of America, a claim against said bankrupts in the sum of two thousand and ninety dollars and forty cents, for revenue stamps sold by said Wing as the deputy of H. B. Rowlson, Collector for the Third Revenue District of Michigan; that the assignee instituted proceedings under General Order 34 for the re-examination of the claim; pending which, Wing filed a petition to be subrogated to the claim as proved in favor of the United States. Both proceedings were heard together, testimony was taken, and the parties heard by counsel; the assignee by Mr. T. Romeyn, and Wing by Mr. A. Russell. The register entered an order dismissing the petition for the re-examination of the claim, and that Wing be subrogated to the rights and interests of the United States; which order, at the request of the assignee, the register certified into court for determination by the district judge.

### OPINION OF THE REGISTER.

The principle of *subrogation* is well stated in the article under this title in Johnson's Cyclopedia, thus: "Whenever a person *secondarily* liable for a debt pays the same, the demand is not thereby absolutely discharged; but he, at once, by the operation of the equitable doctrine, succeeds or becomes subrogated to all the rights, remedies, and securities which the creditor held against the debtor primarily liable, and may enforce the same as a creditor against such debtor in order to reimburse himself for the outlay which he has made on behalf of that party." The illustrations usually given of the application of this principle are those of mortgagees, sureties, and guarantors.

In this case, Wing, as deputy collector, had sold to the bankrupts revenue stamps to the amount of two thousand and ninety dollars and forty cents. At the time of the sale of one thousand dollars of these stamps, two checks on a firm of bankers in Detroit, drawn by C. Ives, one of the bankrupts, were delivered to Wing, one for five hundred dollars and one for five hundred and ninety dollars and forty cents, both of which were dishonored on presentation. Stamps to the amount of one thousand dollars more were delivered on the day of the failure of the bankrupts, to their shipping clerk, on his statement that Mr. Ives was ready to pay for them. Much of the testimony taken seems to have for its purpose to show some arrangement between the bankrupts, Mr. T. E. Wing, the father and bondsman of the deputy collector, and Mr. C. R. Wing; but, whatever it shows, the fact is left clear that stamps to the value claimed were delivered to the bankrupts, and they have not been paid for. The testimony also shows that the Government makes no claim against the bankrupt's estate, because the amount has been assumed and paid by Mr. Wing, the deputy collector, either out of his own money, or by means furnished by his father, who is his bondsman. He made this payment because he had become legally liable for the value of the stamps which he had delivered to the bankrupts, and for which they had not paid. This liability results from his duty as a public officer to take nothing but money. That public officers do constantly take checks upon banks as money, and that their own and the convenience of business men dealing with them is thereby promoted, is, probably, well known. But if they should refuse to take anything but coin, or the currency furnished by the Government, and should then be imposed upon by counterfeits, their liability would be the same as it is upon a protested check; and thus, whatever they take, they become, as public officers, guarantors to the Government, on behalf of the parties with whom they have dealings, that that which they treat as money shall produce money to the Government. A collector in the position now occupied by Mr. Wing is a guarantor of the most meritorious character. If the Gov-

ernment were now prosecuting this claim it would be paid in full, and it seems to me inequitable to allow the general creditors of the bankrupts' estate to be benefited at the expense of the deputy collector, who, to make good his guaranty to the Government, has assumed and paid the sum owing by the bankrupts' estate.

HOVEY K. CLARKE, *Register.*

*T. Romeyn*, for the assignee.
*A. Russell*, for the claimant.

BROWN, J.—Approved the opinion of the register, and directed an order to be entered subrogating Wing to the rights of the United States as a preferred creditor.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

AUGUST 15, 1879.

An action may be maintained by the assignee in bankruptcy against a voluntary assignee and intervening execution creditors to avoid the assignment and recover of such creditors the avails of the property levied upon and sold by them.

The rule that where a party has come lawfully to the possession of property replevin or trover will not lie until after a demand and refusal, does not apply to a case where, before suit brought, the defendant has actually disposed of the goods and put it out of his power to restore them.

## *JOSEPH LINDER, Assignee, &c.*, v. *FREDERICK LEWIS et al.*

THE facts appear fully in the opinion.

*G. H. Yeaman*, for complainant.
*M. H. Regensberger* and *R. D. Benedict*, for defendants.

CHOATE, J.—Upon the hearing of exceptions to the master's report and motion for a final decree, the respondents, the sheriff, and the judgment creditors, upon whose executions the property included in the voluntary assignment from the

bankrupts to the respondent Lewis was seized, object to the entering of any decree against them, and claim that in the former decision of the court, in accordance with which an interlocutory decree was entered against them for an account of that part of the assigned property which came into their hands, there was error that no case for equitable relief is made against them. It is suggested on the part of the complainant that the proper way to raise this question is upon an application for a rehearing. The respondents have the right on the application for a final decree to raise the question. At the final hearing of the cause all the previous interlocutory orders in relation to the merits are open for revision and under the control of the court. If, therefore, there has been, as is suggested, an obvious error of law in the former decision, this is a proper stage of the case for its correction. (*Fourniquet* v. *Perkins*, 16 How., 82.) And as the points now urged in favor of these respondents were not presented to the court upon the former hearing, I have carefully considered them, treating them as undetermined in the decision hereinbefore rendered. The facts have been already stated. The sheriff levied on the property included in the voluntary assignment, and the goods were sold and the proceeds paid over to the judgment creditors in satisfaction of their executions after the execution and delivery of the voluntary assignment and before the filing of the original petition in bankruptcy. The suit is brought against the voluntary assignee, the sheriff and the judgment creditors, first, to avoid the assignment as in contravention of the bankrupt law, and secondly, to recover of the respondents the property, or the proceeds of such parts of it as they have disposed of. It has been determined in the case that the assignment was void as against the assignee in bankruptcy on the ground alleged in the bill, that it was made in contemplation of insolvency with intent to defeat the operation of the Bankrupt Law, and it has been set aside; and it has been held that, under the authority of the case of *In re* Biesenthal (15 N. B. R., 228), the title of the assignee in bankruptcy related back to the time of the execution of the voluntary assignment,

and the execution creditors took nothing by their levy. It is now suggested that upon this theory of the case the only remedy of the assignee in bankruptcy is by an action at law in the nature of an action of trespass for interfering with his property, or of an action of trover for its conversion; that such remedy is full, adequate, and complete, and that therefore the assignee in bankruptcy has no remedy in equity against these respondents; that there was no ground for making them parties to a bill for setting aside the assignment; that they do not claim under the State assignee, but in hostility to him. It is further objected that no decree should be made against them because they claim that the assignment was void under the laws of New York, and therefore, whether it was voidable under the Bankrupt Law or not, there was left in the bankrupt a title which, under the laws of New York, could be reached by the levy of execution; and the particular grounds on which it is claimed that it was void are that at the time of the levy of the execution no schedules had been filed and no bond given by the assignee; that the last question of the validity of the assignment under the laws of New York is one which cannot be tried in this suit, but must be tried in a suit between the State assignee and the sheriff, which suit had been commenced before this suit was commenced. It is further insisted that this case is distinguishable from the case of *In re* Biesenthal in this respect, that in that case the property in question on which a levy had been made—part of the assigned property—had not been sold by the sheriff, but was afterward sold by consent of the parties in the suit to set aside the assignment, and the proceeds deposited in the registry of the court to abide the decision of the court in that suit as to the rights of the parties, so that there was a fund in court, in respect to which the court had jurisdiction to determine all rights, or the execution creditors were parties claiming a lien and interest adverse to the complainant in respect to the very property in controversy between the assignee in bankruptcy and the State assignee in the suit brought to set aside the assignment. Whereas, in the present case the question between the assignee

in bankruptcy and the execution creditors relates not to any specific property, part of the assigned estate, or to any proceeds of it traced and identified as such, but his claim against them is merely for money damages.

It is true that there is this distinction in the facts between this case and the case of *In re* Biesenthal, that here no part of the assigned property, or of its proceeds traced and identified as such in the form of a particular sum of money, is shown to be in the possession of the execution creditors, but the property has been sold by the sheriff upon their procurement, and the money has, before the institution of bankruptcy proceedings, been paid to them and applied in part satisfaction of their judgments, whereby its identity as part of the assigned estate has been wholly lost. It is true, also, that in levying their executions on this property as the property of the bankrupt, they have not claimed under, but in hostility to, the assignment. But it does not follow from these differences in the facts that the case of *In re* Biesenthal does not apply, nor that the complainant has not properly made them parties defendant to this suit, or that he has any remedy at law to recover from them the proceeds of the assigned property received by them.

A voluntary assignment made within the time before bankruptcy limited by the Bankrupt Law, and in violation of its provisions, is not on that account absolutely void. It is voidable only at the option of the assignee in bankruptcy, and the proper and only way in which he can exercise that option is by a suit in equity to set it aside. It may be for the interest of the creditors and it may be his duty not to exercise that option, but by neglecting to bring a suit for that purpose to affirm it, so far as he is concerned. If, therefore, this complainant had brought no suit to set aside the assignment, the defendant's levies of execution could not be impeached by him, and their title as against him would be perfect. He could not, therefore, without suit to set aside the assignment, maintain trespass or trover against them. This answer would be complete —that the assignment was voidable only, not void; that it had never been avoided; that for that purpose the State assignee

must be made a party defendant; that if avoided it must be avoided in whole and not in part; that the assignee could not, as to that particular part of the property levied on, elect to avoid the assignment, leaving it in full force as to all the rest of the assigned property. Nor would these respondents in such a suit be estopped to deny that the assignment was void under the Bankrupt Law. They might be estopped to deny that it was void under the laws of New York, because by levying on the property as the property of the debtor they affirm the invalidity of the assignment, but that invalidity is not the same sought to be established under the Bankrupt Law.

Nor, as it seems to me, could the assignee in bankruptcy, having brought suit against the State assignee without joining these defendants, and obtained a decree avoiding the assignment, then maintain an action at law against these execution creditors to recover the money paid to them out of the proceeds of the assigned property, and put in evidence his decree against the State assignee in proof of the invalidity of the assignment under the Bankrupt Law. They might well answer that that decree was not binding on them in respect to the part of the property received by them; that the case of the complainant against them depending upon the question whether the assignment was in fact made under the circumstances and with the intent denounced by the Bankrupt Law as making it voidable on that issue, they had a right to a trial before they could be concluded by the decree. It seems clear, therefore, that if the assignee in bankruptcy intends to bring suit against intervening execution creditors who have received part of the proceeds of the assigned estate, he must at any rate make them parties defendant to the suit brought against the State assignee to set aside the assignment. Is there any principle of law or equity which will compel him to bring two suits against them, first joining them as defendants in the suit to set aside the assignment, so that the determination on that question may be binding upon them, and afterward suing them in an action at law, upon the basis of that determination, to recover the moneys? I think not. On the contrary, the general rule is that where

a court of equity acquires jurisdiction for one purpose, it has the power to go on and administer complete relief.

General demurrers to the bill for want of equity were filed by the execution creditors, which demurrers were overruled. I have not treated the overruling of these demurrers as conclusive on this point, because the bill alleges that these levies of execution were fraudulent and collusive, and therefore preferences under the bankrupt law; and as the ground of the demurrers was general want of equity and not the improper joinder of causes of action or multifariousness, and no reasons were assigned by the learned judge who overruled the demurrers, his decision may possibly have been made on the averments that these levies were unlawful preferences. No proof, however, has been given to sustain these averments.

There seems to be no force in the suggestion that the question whether the assignment was absolutely void by the law of New York could be raised and tried in this suit. In fact, that defence is set up in the answers and put in issue by the replications. It has been tried and determined adversely to the defendants. If it had been determined in their favor, it seems that they would have been entitled to a decree dismissing the bill as to them. (*In re* Biesenthal, 18 N. B. R., 120.)

It is further objected that the complainant is not entitled to a decree against these defendants, because it is neither averred nor proved that the complainant, before suit brought, made a demand for the money now sought to be recovered, and that the defendants refused to pay it.

The objection comes rather late and has no especial merit, but possibly it is open at this stage of the case. The cases, however, cited to the effect that where a party has come lawfully to the possession of property, replevin or trover will not lie till after a demand and refusal, do not apply to a case where, before suit brought, the defendant has actually disposed of the goods and put it out of his power to restore them.

It is also suggested that the assignment was absolutely void, because, at the time of the levy, schedules and a bond had not been filed as required by the laws of New York. This point

seems not to have been made upon the former hearing, nor is any authority cited in support of it now. The argument against the assignment before was, that it was not intended for the benefit of creditors, but was fraudulent in fact between the assignors and the assignee, to hinder, delay, and defraud creditors. (See brief of complainant's counsel.) Such failure to file schedules and bond is not expressly made a condition to the assignment's taking effect as a conveyance, and I do not think they are essential to the passing of the title. I see no ground, therefore, for disturbing the former decision against these defendants, that they were liable to account for that part of the assigned property which came to their hands, and which has been shown to belong to the complainant.

An exception is taken to the master's report that he should not have allowed interest. I see no reason why the defendants should not be charged with interest.

Exceptions overruled.

Report confirmed and decree for complainant thereon, with costs.

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UNITED STATES SUPREME COURT.

OCTOBER TERM, 1880.

**An ante-nuptial settlement, though made with a fraudulent design by the settler, should not be annulled without the clearest proof of the wife's participation in the intended fraud.**

## *RICHARD PREWIT and JOSEPHINE PREWIT, appellants, v. ROBERT H. WILSON Assignee, &c., of RICHARD PREWIT.*

APPEAL from the Circuit Court of the United States for the Northern District of Alabama.

The facts appear fully in the opinion.

FIELD, J.—On the 27th of April, 1866, Mrs. Josephine Prewit was a widow, only twenty years of age. Her husband

was the late John Prewit. Not many months after his death another Mr. Prewit—Richard this time—proposed marriage to her. He was of mature age, being in his fifty-eighth year. His proposal was rejected. He renewed it and accompanied it with a promise to settle upon her, if she would consent to the marriage, a large amount of property. This promise moved her to consent. The deed of settlement was accordingly executed, and in May following the marriage took place. Both parties affirm that the marriage was the only consideration for the settlement, and it is so stated in the deed.

A little more than two years and a half afterward—in December, 1868—the husband was adjudged to be a bankrupt in the District Court of the United States for the Northern District of Alabama, in proceedings taken upon his own application, and in the following month the plaintiff was appointed assignee of his effects, and to him an assignment was made. The present suit is brought by him to set aside the deed of settlement, on the alleged ground that it was executed by Prewit to defraud his creditors.

At the time of the settlement Prewit was the holder of a large amount of property, consisting chiefly of lands in Alabama, but was indebted in an amount greater than their value. It is stated that his property was not worth more than fifty thousand dollars, and that his debts exceeded seventy thousand.

It would seem from the evidence, and we assume it to be a fact, that he was insolvent at the time he executed the deed of settlement, in the sense that his debts largely exceeded the value of his property. It may also be taken as true, so far as the present suit is concerned, that he intended by the deed to hinder, delay, and defraud his creditors, and that he made the settlement to place his property beyond their reach.

There is no evidence that Mrs. Prewit was aware at the time of the amount of property he held, or of the extent of his debts, or that he had any purpose in the execution of the deed except to induce her to consent to the marriage. It is not likely, judging from the ordinary motives governing men, that

whilst pressing his suit with her, and offering to settle property upon her to obtain her consent to the marriage, he informed her that he was insolvent, and would, by the deed he proposed to execute, defraud his creditors. If he intended to commit the fraud imputed to him, it is unreasonable to suppose that he would, by unfolding his scheme, expose his true character to one whose good opinion he was, at that time, anxious to secure. If capable of the fraud charged, he was capable of deceiving Mrs. Prewit as to his pecuniary condition. She states in her answer that she knew he was embarrassed and in debt, but to what extent or to whom she did not know, and that it was because of the knowledge that he was embarrassed that she insisted upon his making a settlement upon her. The deed itself shows that he owed a large sum, for of the six thousand seven hundred and seventy acres of land embraced by it, two thousand one hundred and eighty-five acres were charged with the payment of certain designated debts to the amount of eighteen thousand dollars. A knowledge of these facts justifies her in saying that she knew he was embarrassed, but they rather dispelled than created any suspicion that he had a design to defraud his creditors. Her statements do not warrant the inference of knowledge of any such purpose, much less of any assent to its execution. Besides the property charged in the deed with the payment of the large amount of indebtedness mentioned, he owned four thousand seven hundred acres of land not included in it, and personal property to the value of several hundreds of dollars.

When a deed is executed for a valuable and adequate consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld, however fraudulent his purpose. To vitiate the transfer in such case, the grantee also must be chargeable with knowledge of the intention of the grantor.

Now, marriage is not only a valuable consideration, but, as Coke says, there is no other consideration so much respected in the law. Bishop justly observes, that "marriage is attended and followed by pecuniary consequences; by happiness or

misery to the parties; by life to unborn children; by unquiet or repose to the state; by what money ordinarily buys and by what no money can buy, to an extent which cannot be estimated or expressed, except by the word infinite. To say, therefore, that it is to be regarded, where it is the inducement to any contract, as a valuable consideration, is to utter truth, yet only part of the truth." And also, that "marriage is to be ranked among the valuable considerations, yet it is distinguishable from most of these in not being reducible to a value which can be expressed in dollars and cents, while still it is in general terms of the very highest value." (Law of Married Women, Secs. 775–6.) Such is the purport and language running through all the decisions, both in England and in this country, with reference to marriage as a consideration for an ante-nuptial settlement. (*Barrow* v. *Barrow*, 2 Dickens, 504; *Nairn* v. *Prowse*, 6 Vesey, 752; *Campion* v. *Cotton*, 17 Vesey, 264; *Sterry* v. *Arden*, 1 Johns. Ch., 261; *Herring* v. *Wickham*, 29 Grattan, 628.)

In *Maginac* v. *Thompson* this court said that "nothing can be clearer, both upon principle and authority, than the doctrine that to make an ante-nuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the settler alone intended a fraud and the other party have no notice of it, but is innocent of it, she is not and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution." (7 Peters, 393.)

The same doctrine is asserted by the Supreme Court of Alabama, in which State the parties to the deed of settlement reside and in which it was executed. (*Andrews* v. *Jones*, 10 Ala., 401.)

According to these authorities there can be no question of the validity of the settlement in this case. There is an entire absence of elements which would vitiate even an ordinary transaction of sale where, if set aside, the parties may be placed in

their former positions. And an ante-nuptial settlement, though made with a fraudulent design by the settler, should not be annulled without the clearest proof of the wife's participation in the intended fraud, for upon this annulment there can follow no dissolution of the marriage, which was the consideration of the settlement.

It follows that the decree of the court below must be reversed, and the cause remanded with directions to dismiss the bill of complaint; and it is so ordered.

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UNITED STATES DISTRICT COURT—MAINE.

NOVEMBER 20, 1879.

J., being administrator of an estate, used the funds thereof for the purposes of a firm of which he was a member; an account thereof being kept on the books of the firm to the credit of the estate. *Held*, that a joint and several claim was thereby created against the joint and several estates, and that it could be proved against the firm estate and the individual estate of J.

An administrator *de bonis non* can sustain such proof.

## *In re JORDAN & BLAKE.*

APPEAL from decision of register, allowing proof of claim by Eliza J. York, administratrix *de bonis non.*

The facts appear fully in the opinion.

FOX, J.—Dexter Jordan, one of the firm of Jordan & Blake, was administrator on the estate of Robert M. York, and having collected considerable sums of money, as administrator, used them for firm purposes; an account being opened on the firm books of Jordan & Blake, by which the "Estate of R. M. York" was from time to time credited with all sums thus received by Jordan, and charged with all disbursements made by him from the estate. The firm having been adjudged bankrupt, and Jordan having since died, Mrs. York, as administratrix *de bonis non*, claims to prove against the firm estate, and also the individual estate of Jordan, this balance due from Jordan, there being assets of both of said estates. The register

allowed the proof against Jordan's estate and disallowed the proof against the firm estate; and from this an appeal is taken.

The construction given by Judge Lowell, in *In re* Blaudin (5 N. B. R., 39), to the provisions of the Bankrupt Act, respecting proof of debts, relieves these matters of some objections of a technical nature, which otherwise might perhaps occasion doubt.

In that case, the wife of a bankrupt had loaned her husband money, and claimed to prove for the same against his estate, although, by the laws of Massachusetts, she could not sustain an action at law for its recovery. Judge Lowell there held, that equitable claims were within the scope of the Bankrupt Act, and that it was the intent of the Act to give all creditors an equal share of the assets, without regard to the mode in which their right might have been enforced if there had been no bankruptcy; that as to both debtors and creditors, the Act is highly remedial, and the District Court is vested with most ample equitable powers to enable it to work out full remedies to all persons; although the 24th Section provided, on appeal, the ordinary remedy by a suit at law, the Circuit Court might take such order in relation to appeals, not fully provided for by Section 24, as may be necessary to conform the proceedings to the nature of the case. James, L. J., in *Ex parte* Adamson (L. R., 8 Ch. Div., 807), states the law as follows: "It being the established rule in bankruptcy that every debt which a person could, either in his own name or in the name of any other person, recover at law, or in equity, was a provable debt in bankruptcy."

Jordan, as the administrator of York's estate, was not authorized to appropriate to the use of Jordan & Blake the funds held by him in that capacity. It was, in law, a breach of his trust as administrator, and although no fraud was intended by him, his act was in violation of law. By the entries upon the firm books of the various sums thus paid to the firm, his co-partner Blake became cognizant of the transaction; and the firm thereby became chargeable as trustees for the amount thus loaned to the firm by Jordan as administrator.

In England there is a uniform current of authorities, that where trust funds are thus misappropriated, and loaned by an executor or trustee under a will to a firm, with the sanction of its members, this amount constitutes a joint and several claim, provable against the firm and the individual members of the firm who have knowledge of the transaction. Under the law, as it was formerly declared in England, and so long as double proof was not permitted, it might be that the creditor was put to his election, whether to proceed eventually against the firm estate or of its members; though at the present day, since the Act of 1869, it may be that double proof might now be there permitted. No such question of election can here arise, as our Bankrupt Act, and the decisions of the courts here, allow of double proof, in all cases where a joint and several liability exists.

The following are some of the English cases which permit proof of debt to be made where an executor or trustee has committed a breach of trust by improperly loaning the funds in his hands:

*Ex parte* Watson (2 V. & B., 414); *Ex parte* Heaton (Buck's Bankruptcy Cases, 386), in which the vice-chancellor says: "Those who receive trust property from a trustee, in breach of his trust, become themselves trustees, if they have notice of the trust"; *Ex parte* Poulson (De Gex, 79); *Ex parte* Woodin (3 Mont. Dea. & De Gex, 399; 6 De Gex, M. & G., 795–801); *Ex parte* Carne (L. R., 3 Ch., 463); *Ex parte* Norris (L. R., 4 Ch., 280); *Ex parte* Adamson (L. R., 8 Ch. D., 807).

In *Adair & Shaw* (1 Sch. & Lef., 243), Ld. Redesdale says: "Trusts are enforced, not only against those persons who rightfully are possessed of the trust property as trustees, but also against all persons who come into possession of the property bound by the trust, with notice of the trust; and whoever so comes into possession is considered as bound, with respect to that special property, to the execution of the trust."

Many of the authorities will be found in 2 Lindley on Part., 1247.

Judge Treat (*In re* Tesson, 9 N. B. R., 378) held that

where an executor had invested funds of the estate in his partnership business, with the knowledge and assent of his copartners, the parties entitled to the fund may prove their debts against the partnership, although they have proved against the estate of the executor. The only point upon which the learned judge appears to have entertained any doubt was whether they could pursue both the firm and individual estates. By later decisions this point is clearly established.

It is clear, therefore, from those authorities, that for this wrongful use of these trust funds by the partnership, the partnership and its members have become chargeable, and that a joint and several claim was thereby created against the joint and several estates.

Can an administrator *de bonis non* sustain such proofs? It is certainly for the interest of all concerned in the York estate, whether as creditors, legatees, heirs, or sureties on his administratrix bond given by Jordan to the judge of probate, that these proofs should be sustained, if possible, in behalf of the administratrix *de bonis*, so that the fund may pass under her control, and be administered according to law, as part of the assets of the estate; and after some deliberation, I am satisfied that it may be so done.

By the law of this State (R. S., Chap. 72, Sec. 15), the judge of probate may expressly authorize any party interested to commence a suit on a probate bond, for the benefit of the estate; and the judgment and execution, by Section 17, is recovered by the judge of probate, in trust for all parties interested in the penalty of the bond, and he shall require the delinquent administrator to account for the amount of the same, if still in office; but, if not, he shall assign it to the rightful administrator, to be collected, and the avails thereof accounted for, and distributed, or otherwise disposed of, as assets.

This statute has so far changed the common law, as declared by the Supreme Court of the United States in *Beall* v. *New Mexico* (16 Wall., 535), that that decision is no longer applicable in this State.

As the law now is, not only the funds belonging to the estate in the hands of the administrator, at his death or removal, are assets, which go to the new administrator; but all sums recovered from him and his bondsmen, for breach of his duty as administrator, are to be received by the new administrator and treated as assets.

Any difficulty which might otherwise arise from a want of privity between the old administrator and the new is thus obviated, and by a reasonable construction of this statute, it follows, that in a proceeding of this nature, the new administrator should be at liberty to reach the assets whether in the hands of the former administrator or of other parties who are chargeable with holding them in violation of law. Under the law, as it now stands in this State, it being the duty of the administrator *de bonis* to administer upon the whole estate, to collect and apply to the common benefit all that has not been so done, the Bankrupt Court, acting as a court of equity, will aid him to reach whatever property has been wrongfully misapplied by his predecessor, and which is chargeable as assets of the estate. It is indisputable that Jordan & Blake were accountable to some one for this amount; from some quarter a claim should be made, therefore there is no way in which it can be so directly applied where it belongs as by allowing the administratrix *de bonis* to receive it. It is needed to meet the various claims still remaining unadjusted against the York estate; and I think that upon the ground of trust, aided by the statute above referred to, the proofs may well be sustained against the firm estate, and also against the individual estate of Dexter Jordan.

I hold also that, under the statute, proof might be supported against Jordan's estate upon the bond given by him as administrator.

In Massachusetts there is a statute quite similar to the one in this State, and in *Wiggin*, administrator *de bonis*, v. *Swett* (6 Met., 194), Shaw, C. J., says "that by virtue of this statute, such administrator becomes the sole representative of the estate, the trustee for all persons having an interest in it; that he is per-

sonally interested in the estate, and is aggrieved in his property, if there be a failure to account for all that is due to the estate, and therefore may appeal; and this view is sustained by the opinion of the court in *Newcomb* v. *Williams et al.* (9 Met., 525). The proofs, I hold, may be sustained upon another ground. Jordan, as administrator, loaned the money of the estate to the firm; it became a debt due to him in that capacity, which if he had not been one of the firm, he could have enforced against the firm as administrator, and when collected the avails would have been assets.

There was an implied promise to pay to the estate of York these funds belonging to York's estate, and this implied promise, I hold, would be the foundation of an action at law in behalf of the administratrix *de bonis non* against the firm.

In *Catherwood*, administrator *de bonis*, v. *Chabaud* (1 B. & C., 150), the plaintiff sustained an action on a bill of exchange, endorsed to the former administrator, in payment of a debt due the estate. Holroyd, J., in his opinion, says: "The decisions in the old cases proceeded upon the principle that contracts made with an administrator were personal to him, and that he must sue upon them in his own right, and not in his representative capacity. That principle has since been altered, and it has been ruled in several modern cases that upon such contracts an administrator may sue in his representative capacity. In the same case, Bailey, J., says: "An administrator may sue in his representative character upon promises made to himself, when the money will be assets when recovered. Now, if the administrator dies intestate, without having sued upon such a promise, the administrator *de bonis non* may sustain an action upon it, for he succeeds to all the legal rights which belonged to the administrator in his representative capacity. By this mode of proceeding the money received is immediately applicable to the right fund, as assets of the first intestate; whereas, if the action had been brought by the personal representative of the first administrator, it would in the first instance have become a part of his estate, and must afterward have been transferred from that to the estate of the first intestate."

In *Mosely* v. *Rendell* (L. R., 6 Q. B., 338) Cockburn, C. J., says: "If the promise was made to the original administratrix, as administratrix, the proceeds of the action would be assets, and the administrator *de bonis non* is the proper person to sue." *Sullivan*, administrator *de bonis*, v. *Holker* (15 Mass., 374) is to same effect.

The entry on the books of Jordan & Blake of the credit to estate of R. M. York of these sums, conclusively shows that the promise was to that estate; the loan was made by the estate; the firm thereby became the debtors of the estate, and the debt still remains due from the firm to the estate, and should be paid to, or collected by the representative of the estate.

The decision of the register is overruled, and the proof allowed against the joint estate.

NOTE.—As the register allowed proof against the individual estate of Jordan, and the court allowed that proof to stand, double proof was thus authorized by the court.

## UNITED STATES SUPREME COURT.

### OCTOBER TERM, 1880.

**The knowledge of attorneys of a judgment creditor in regard to the insolvency of the debtor, and an intent to evade the Bankrupt Law, is the knowledge of the creditor.**

**Where the debtor is the son of the creditor and actively contributes to having judgment rendered before it could be done without such aid, this is procuring his goods to be taken on execution within the meaning of Section 35 of the Bankrupt Law.**

### *JOSIAS M. ROGERS, Assignee, &c., of Andrew Palmer, Jr.*, v. *ANDREW PALMER, Sr.*

APPEAL from the Circuit Court of the United States for the District of Minnesota.

The facts appear fully in the opinion.

MILLER, J.—The appellant, who was complainant below, is assignee in bankruptcy of Andrew Palmer, Jr., son of the appellee.

The father, having procured a judgment against his son in the District Court of Freeborn County, Minnesota, for the sum of eight thousand four hundred and thirty-three dollars, caused execution to be issued thereon and levied upon the stock of goods of the defendant, who was a merchant in business in the town of Albert Lea, in said county.

Within a few days thereafter proceedings in bankruptcy were instituted against the son, and he was duly declared a bankrupt, and the assignee brought this suit in chancery for the purpose of having the levy declared void as a fraud upon the Bankrupt Act, and the goods, or their proceeds, subjected to administration in the bankruptcy proceeding. After answer and issue taken, and considerable testimony, the Circuit Court dismissed the bill, and from that decree appeal is taken to this court.

The bankrupt was indebted to his father on three promissory notes of several years' standing, and long overdue, on which payment of interest has been made with regularity until a year before the bankruptcy. About that time the father, who lived in Wisconsin, visited the son, who lived in Minnesota, and received a mortgage on some land, but not sufficient in value to secure the debt. In July, 1875, he again visited his son in Albert Lea, and not long afterward he sent the notes for collection to Lovely & Parker, attorneys of that place, and they commenced suit by the issue of a summons, October 23, 1875, which was served the same day. On the 5th of November an affidavit was made in the case by Parker, one of the attorneys, on which an attachment was issued and levied on the entire stock of the defendant's goods. In this affidavit Parker stated, without qualification, that the defendant was about to dispose of his property with intent to delay and defraud his creditors.

By the course of procedure in the courts of Minnesota, the plaintiff in that suit was entitled to judgment on the 13th of the month, if no plea or answer was interposed, and none *was* filed by the defendant.

Two days before this time, however, other creditors of

Palmer, hearing of the condition of affairs, came to look after their interests; and to prevent this judgment, before they could initiate proceedings in bankruptcy, they filed a bill in equity in the same court, and procured an order enjoining the plaintiff and his attorneys from taking their default and judgment, on the ground that the proceeding was fraudulent and collusive between father and son. This injunction was issued on the 12th, and on the 13th, the first day on which a judgment by default could be entered, it was dissolved on the affidavit of Andrew Palmer, Jr., drawn up by one of the attorneys for his father, denying all the allegations of the injunction bill, and stating that his father's debt was a just one, was due and wholly unpaid to the amount stated in the complaint. Immediately, and on the same day, judgment was rendered and execution levied on the stock of defendant's merchandise.

In a few days thereafter the debtor, Palmer, was duly declared a bankrupt, and by agreement the goods were sold, the amount deposited in the Bankrupt Court, subject to the final decree in this suit, as the goods would have been if they had not been sold.

There is no question that at the commencement of the suit by the father the son was insolvent.

There are many circumstances besides the affidavit made by the son to show that he and his father had a perfect understanding in regard to that suit. Among these are the visit of the father only a few months before it was commenced; the absence of any special reason for suing at that time after eight years' delay, and shortly after security was given by mortgage for the debt, though insufficient; that the notes were sent to and the suit managed by the attorneys who had been usually employed by the son; that as soon as the goods were attached the son moved his books and papers into the office of these attorneys, and that he seems to have been in full consultation with them throughout the whole proceeding.

When we come to add to these the voluntary affidavit of the defendant, on which alone the injunction was dissolved, the effect of the dissolution being to enable the father to obtain

judgment, under which an execution was issued and a lien established on all the defendant's goods, we are satisfied that the son actively aided the father in securing this seizure of his property, with a design to prevent that property being distributed equally among his creditors under the proceedings in bankruptcy, which he knew would be commenced in a few days.

Several of these creditors were present when the injunction was dissolved and judgment rendered, and the injunction, as the attorneys and the debtor Palmer knew, was obtained to stave off the judgment until they could apply to the Court in Bankruptcy. To delay the judgment until that was done would be fatal to the preference of the father's debt, for by the Bankrupt Law the attachment was dissolved when he was adjudged a bankrupt, and unless execution on the judgment could be levied before that time, the goods would pass to the assignee, relieved of any claim under judgment in favor of the elder Palmer.

Whether, therefore, the father should be paid in full, to the exclusion of other creditors, or not, depended on the dissolution of that injunction, and that was obtained solely on the voluntary affidavit of the insolvent son.

We are satisfied that he procured this preference and this taking of his goods on execution with a purpose of defeating the operation of the Bankrupt Law, within the meaning of the Act on that subject. (Section 35 of Bankrupt Act.)

But in order that the assignee shall recover the value of the goods seized on execution, it is not alone sufficient that the bankrupt should have aided in procuring the seizure, but it is also necessary that the creditor should have had reasonable cause to believe that the debtor was insolvent, and should have known that a fraud on the Bankrupt Act was intended.

We think this is the result of Sections 35 and 39 of the original Bankrupt Law as amended by the Act of June 22, 1874, which changed the original Act in important particulars, and which, so far as it may conflict with that Act or the revision, must be held to control them both. (18 U. S. Statutes, part 3, pp. 180, 181.)

This latter statute carefully introduces the word *know* in-

stead of *reasonable ground to believe*, in regard to the purpose to defraud the Bankrupt Act.

We have little difficulty in coming to the conclusion that the elder Palmer had reason to believe that his son was insolvent at the time judgment against him was taken and the execution levied on the property. We have already given the reasons for this, to which may be added that his son swears that he wrote to his father, pending negotiation with his other creditors and before the judgment was taken, asking him to consent, with the other creditors, to accept a compromise of fifty per cent. for his debts.

It is a little more difficult to say that the father *knew* that the goods were seized with intent to defraud the Bankrupt Law. Possibly at the moment of the seizure he did not know personally all that his attorneys and his son had done, nor all that they knew. It may be that he supposed his suit would proceed in regular order, without the aid of his son, or any act on the part of his attorneys intended to evade the Bankrupt Law. He may not have known personally that other creditors were on the ground contesting his right to a judgment, and still others on the way to the proper court to institute bankruptcy proceedings, which, if done before the goods were seized under his execution, would defeat his purpose of securing a prior lien.

But this cannot be said of the attorneys who represented him on the ground. One of these had, only a few days before, made oath that the son was about to dispose of his property to delay and defraud his creditors. This, if true, was certainly a fraud upon the Bankrupt Law. Instead of instituting a proceeding in bankruptcy, this attorney swore out an attachment in favor of his client, which would be a fraud upon the Bankrupt Law by preventing the equal distribution of this debtor's property among his creditors.

These attorneys also procured the debtor to make the affidavit in the injunction suit, with the perfect knowledge that if they thereby succeeded in dissolving it, their client would seize the goods, and make his debt in preference to all other creditors, though they knew that other creditors were on their way

to St. Paul to initiate bankruptcy proceedings. They, therefore, knew and intended that their action in behalf of their client would work a fraud upon the Bankrupt Law.

Is this knowledge imputable to the appellee in this case?

The case of *Hoover* v. *West* (14 N. B. R., 264; 91 U. S., 308) was one in which a creditor had procured a confession of judgment and a levy on property of a debtor who was declared a bankrupt within four months thereafter.

The creditor had sent his note to a collection agency in Philadelphia, which had sent it to their corresponding attorney in Nebraska, where the judgment was taken. The creditor knew nothing of what was done until the money was made by sale of the goods, and had given no direction as to the mode of proceeding, and held no communication with his attorney. This court held that the attorney was the agent in the transaction of the collecting agency and not of the creditor, and that he could not be held to know what the attorney knew in regard to the insolvency of the debtor, and other matters in the case. Three of the judges dissented from this view. But an examination of the opinion will show that all were agreed that if the creditor had sent the note directly to the attorney, the latter would then have been the agent of the creditor, whose acts and whose knowledge, obtained in the course of the employment, would have been the acts and the knowledge of his principal. And such, we think, is the true rule of law.

That the attorneys of the elder Palmer and the son were aware of his insolvent condition, and were co-operating to have the property of the latter seized in execution before the Bankrupt Law could be set in force, with intent to defeat its operation on the son's property, we think is quite clear. And this we understand to be a fraud upon the Bankrupt Law, where the debtor contributes actively to that end. (See *Wilson* v. *The City Bank*, 9 N. B. R., 97, 17 Wall., 487; *Little* v. *Alexander*, 12 N. B. R., 134, 21 Wall., 500.)

The result of these considerations is that the decree of the Circuit Court must be reversed, and a decree for plaintiff below, in conformity to this opinion; and it is so ordered.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JULY 24, 1880.

An order authorizing the assignee to surrender to a creditor certain securities held by him on release of the debt which they were given to secure was granted *ex parte* on application by the assignee and an affidavit setting forth that the debt was due and amounted to more than the present value of the securities. On application by a creditor to vacate said order it appeared that the bankrupt had paid usurious interest on the debt, and that if the excess over the legal rate of interest was applied to the payment of the principal the debt had been fully paid before the bankruptcy; that the assignee knew of the usurious character of the transaction, and used such knowledge in the negotiation for the compromise. *Held*, that the payments of interest in excess of the legal rate could not be considered as voluntary payments, and must be applied in liquidation of the principal; and that the order having been procured by a material misrepresentation of facts, although not necessarily fraudulent, in a case where the court would not have made it if the real facts had been stated, it should be vacated.

Any creditor may apply to the court to have an order which, through mistake or fraud, has been improperly made to the prejudice of the creditors, vacated and set aside.

A bankruptcy court cannot authorize the compounding of a claim without notice to creditors, except upon testimony and a petition clearly and distinctly setting forth the subject matter of the controversy and the reasons why the assignee thinks it proper and most for the interest of the creditors that it should be settled.

## *In re JOHN R. HOOLE.*

THE facts appear fully in the opinion.

*George C. Black*, for petitioner.
*F. A. Paddock*, for respondent.

CHOATE, J.—This is an application to the court to vacate an order entered in this proceeding on the twelfth day of April, 1877, whereby the assignee was authorized to surrender to one Charles E. Larned three policies of life insurance belonging to the estate, upon the release by said Larned of the alleged indebtedness, as security for which Larned held the policies under a pledge thereof made by the bankrupt before the filing of the petition in bankruptcy, which indebtedness was said to exceed the value of the security by about three hundred and fifty dollars. The order was entered upon the petition of the assignee and the

accompanying affidavit of Larned, setting forth the following facts: That the petition in bankruptcy was filed February 3, 1877; that May 1, 1876, the bankrupt was indebted to Larned in the sum of two thousand seven hundred and fifteen dollars and eighty-five cents for money loaned; that Larned held as security for this sum the three policies for the amount, in all, of six thousand dollars, the present value of which was two thousand five hundred and thirty-one dollars and eighty-nine cents; that Larned was willing and desirous of accepting the policies in full satisfaction of the debt, and agreed to release the bankrupt estate from all claims and demands upon the transfer of the policies; that the assignee believed this liquidation of the debt would greatly benefit the estate. The petition was verified by the assignee, and accompanied by an affidavit of Larned to the truth of these facts. Thereupon, and without any notice to creditors, or any further proceedings, the court granted the application, and the order was entered.

A creditor now moves to vacate the order, on the ground that the estate was not, in fact, indebted to Larned; that the debt for which the policies were pledged had been paid in full, and that he had no valid claim on the policies, but that they should be surrendered to the assignee as assets belonging to the estate. The petition to vacate the order was filed on January 16, 1879. Upon an order to show cause thereon, Larned appeared and put in an affidavit in answer to the petition, denying that the debt had been paid, or any part of it, and insisting on the truth of the averments of the petition on which the order was entered, alleging that he had sold and assigned the policies to one Ross and was no longer interested in them. Testimony has been taken upon the petition and answer, and the matter has now been heard upon the papers and the testimony. No point is now made of any assignment of the policies to Ross, nor is there any proof of any such assignment. The case has been argued and submitted as if there was no third party who had acquired intervening rights which the court might be obliged to recognize and protect.

The material facts proven and not disputed are as follows:

In re Hoole.

In 1870 the bankrupt was in partnership with his son, John R. Hoole, Jr., in the business of bookbinders, and the firm borrowed money of Larned on their notes, for which he took as collateral security two of the life policies. John R. Hoole, Jr., died in February, 1872, and thereafter the bankrupt continued the business alone. In May, 1872, in order to settle up the affairs of the firm, the bankrupt took up the firm note and gave his own notes for the loan, the policies remaining as collateral security. During 1873 the bankrupt borrowed a further sum of Larned on his own note, giving him as security the third life policy. Lending money on security was part of Larned's regular business, and he continued to hold the policies down to the time of the bankruptcy, and till the application of the assignee for leave to transfer them to him upon release of the debt. The notes given were demand notes, but some part of the debt has been paid, and the notes were renewed from time to time for the unpaid amounts, and, at the time of the application to the court by the assignee for leave to make said settlement, Larned held the notes of the bankrupt, on which there was apparently due the amount alleged in the petition, two thousand seven hundred and fifteen dollars and eighty-five cents, with interest from May 1, 1876.

From the beginning of these transactions, however, John R. Hoole & Son and John R. Hoole allowed and paid interest on the loan far in excess of seven per cent. per annum, generally at the rate of two per cent. per month, and if the excess of these payments above legal interest is applied to the payment of the principal of the loan, then the debt had been fully paid before the bankruptcy, and there was nothing due Larned for which he could hold the policies as security. It is claimed by this petitioning creditor that the excess of interest paid should be thus applied; that nothing was in fact due Larned; that the petition of the assignee and Larned's affidavit were, therefore, false, and the order entered thereon should be vacated.

On behalf of Larned, it is claimed that the arrangement or compromise made was made in good faith between him and the assignee; that it was made at the solicitation of the assignee

himself; that the assignee then knew all the facts now disclosed; that to apply the excess of interest, as now claimed, would be in effect enforcing the defence of usury against him by the assignee when the assignee did not himself set it up, and that he had a right to waive it; that the only remedy of the creditors or the assignee was to bring a suit under the statute of New York for the excess of interest paid; and at any rate that the assignee would have had no right to recover by suit the excess of interest paid by the firm of John R. Hoole & Son, nor any right to go back of the time when that firm was dissolved, in applying the excess of interest to the liquidation of the principal; that the remedy of the creditors, if the assignee has been guilty of dereliction of duty in not setting up the usury, or in not collecting and redeeming the assets of the estate as he was bound to do, is to dispute the settlement of his accounts, charge him in account with what he lost by his negligence, or sue him on his bond for neglect of duty. It appears that the assignee gave bond in the sum of twenty-five thousand dollars, with Larned as his surety.

It is unquestionably shown by the evidence that the assignee, who, during all these transactions was the bookkeeper of the bankrupt, knew of the usurious character of the loans, and was familiar with all the details of the transactions. It also appears that he first suggested the arrangement that was made about the surrender of the policies to Larned. The matter was in negotiation for some time. The assignee urged the settlement upon Larned on the ground that he could, if he pleased, defend against Larned's claim on the ground of usury, to which Larned replied that he thought he could beat him. Finally it was agreed to between them, and then application was made to the court to authorize it as above stated. Upon these facts, and upon the respective claims of the parties, I am clearly of the opinion that the order should be vacated.

It is unnecessary to determine whether an assignee in bankruptcy is *bound* to set up usury as a defence to a claim made against the estate for the purpose of avoiding what is in other respects a valid and meritorious claim. That he may do so

Linder, Assignee *v.* Lewis et al.

An action may be maintained by the assignee in bankruptcy against a voluntary assignee and intervening execution creditors to avoid the assignment and recover of such creditors the avails of the property levied upon and sold by them.

The rule that where a party has come lawfully to the possession of property replevin or trover will not lie until after a demand and refusal, does not apply to a case where, before suit brought, the defendant has actually disposed of the goods and put it out of his power to restore them. 455

Prewit et al. *v.* Wilson, Assignee.

An ante-nuptial settlement, though made with a fraudulent design by the settler, should not be annulled without the clearest proof of the wife's participation in the intended fraud. 461

*In re* Jordan & Blake.

J., being administrator of an estate, used the funds thereof for the purposes of a firm of which he was a member; an account thereof being kept on the books of the firm to the credit of the estate. *Held*, that a joint and several claim was thereby created against the joint and several estates, and that it could be proved against the firm estate and the individual estate of J.

An administrator *de bonis non* can sustain such proof. 465

Rogers, Assignee *v.* Palmer.

The knowledge of attorneys of a judgment creditor in regard to the insolvency of the debtor, and an intent to evade the Bankrupt Law, is the knowledge of the creditor.

Where the debtor is the son of the creditor and actively contributes to having judgment rendered before it could be done without such aid, this is procuring his goods to be taken on execution within the meaning of Section 35 of the Bankrupt Law. 471

*In re* John R. Hoole.

An order authorising the assignee to surrender to a creditor certain securities held by him on release of the debt which they were given to secure was granted *ex parte* on application by the assignee and an affidavit setting forth that the debt was due and amounted to more than the present value of the securities. On application by a creditor to vacate said order it appeared that the bankrupt had paid usurious interest on the debt, and that if the excess over the legal rate of interest was applied to the payment of the principal the debt had been fully paid before the bankruptcy; that the assignee knew of the usurious character of the transaction, and used such knowledge in the negotiation for the compromise. *Held*, that the payments of interest in excess of the legal rate could not be considered as voluntary payments, and must be applied in liquidation of the principal; and that the order having been procured by a material misrepresentation of facts, although not necessarily fraudulent, in a case where the court would not have made it if the real facts had been stated, it should be vacated.

Any creditor may apply to the court to have an order which, through mistake or fraud, has been improperly made to the prejudice of the creditors, vacated and set aside.

A bankruptcy court cannot authorize the compounding of a claim without notice to creditors, except upon testimony and a petition clearly and distinctly setting forth the subject matter of the controversy and the reasons why the assignee thinks it proper and most for the interest of the creditors that it should be settled. 477

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# SYNOPSIS OF CASES—No. 11.

Van Kleeck, Assignee, etc., *v.* Miller *et al.*

Where several persons unite in a common design to effect the fraudulent and unlawful disposition of the property of a bankrupt, they may be joined as defendants in one suit brought by the assignee, although the relief sought against them respectively relates to different parts of the estate.

The bankrupt was adjudicated upon a creditor's petition, filed May 15, 1877. More than two months before the filing of the petition he transferred parts of his property to several creditors, in satisfaction of their claims, being then insolvent to the knowledge of said creditors, and he and they knowing that the transfers were intended for the purpose of preferring them over other creditors, to whom he was indebted as endorser for his son, who was also insolvent. *Held*, That the transfers could not be impeached as preferences under R. S. 5128.

One of the creditors so preferred being the wife of the bankrupt, and it appearing that soon after their marriage, twenty years before his bankruptcy, the bankrupt had received moneys belonging to his wife, which he had frequently promised to repay or secure to her, and also had received the income of her separate estate, which he had never restored to her; *Held*, That the transfer to her must be considered the payment of a debt, and not a voluntary conveyance. (*Humes* v. *Scruggs*, 4 Otto, 22, distinguished.)

More than two months before the filing of the petition, the bankrupt conveyed to another party a house and lot, the title to which had been taken in his name, but which was purchased with the money of such other person, and which was in her possession, the title being held at her request and for her convenience in the bankrupt's name; *Held*, That though the trust was void under the laws of New York, the conveyance was not void under the Bankrupt Law, nor in fraud of creditors, nor to be deemed a voluntary conveyance of the bankrupt's estate.

The bankrupt having sold a farm to one S. prior to his bankruptcy for a low price, but not grossly inadequate, the purchaser knowing that he was in financial difficulty, and having reason to believe that he intended to use the proceeds to prefer some of his creditors; *Held*, Upon the facts, that the conveyance could not be set aside as being void under the Bankrupt Law.

The deed to S. not being recorded till after the filing of the creditors' petition; *Held*, Immaterial.

Within two months before the filing of the petition, the bankrupt assigned, in part payment of a debt due his wife, his interest or right to a dividend in the estate of his son, who was indebted to him and had made an assignment for the benefit of his creditors. After the appointment of the assignee in bankruptcy, the assignee under the voluntary assignment of the son brought a suit in the Supreme Court of the State against his assignor and the assignor's creditors, for the settlement of his accounts and the distribution of the assigned fund. The assignee in bankruptcy was made a party to that suit, and put in an answer claiming the dividend as belonging to him as assignee in bankruptcy. The suit coming on for trial, there being evidence that an assignment of the dividend had been made to the bankrupt's wife, she was, by order of the court, made a party defendant, and thereupon the assignee and the bankrupt's wife litigated in that suit the question of the validity of the assignment to the wife, the bankrupt's assignee insisting that it was void on the same grounds on which he sought to avoid it in this suit. The decision of the Special Term was in favor of the bankrupt's wife, but this decision was reversed by the General Term and a decree entered in favor of the assignee in bankruptcy; *Held*, On these facts, that the State Court had jurisdiction

has frequently been decided. The only authority cited by the learned counsel for the respondent for the proposition that an assignee for the benefit of creditors is not bound to do so, seems to be rather the suggestion of a doubt than a ruling to that effect of the learned court. (*Beach* v. *Fulton Bank*, 3 Wend., 573). It would seem that the rights of creditors are fixed and determined by the law, and that the assignee, appointed by the law to enforce them, would hardly be vested with a discretion, which, if it exists, is essentially arbitrary, to enforce them or not as he sees fit. But be this as it may, this question is not involved in the present case. There is a clear distinction between availing oneself of a defence of usury to avoid a loan, and availing oneself of those equitable rules which are applied by the courts in the adjustment of a usurious loan which has not been paid but still remains executory. The former has been sometimes denounced as harsh and inequitable. The latter can never be so considered. For an assignee to give up the benefit of those rules would be in effect applying the estate in payment of usury.

Whenever the parties to a usurious loan are obliged to apply to a Court of Equity for relief for the foreclosure of securities or for their redemption, they are forced to submit to an equitable adjustment of the debt, which is held to be the payment of the loan with lawful interest. All payments of interest in excess of this are held to be under duress and not voluntary payments of interest, and they are applied in liquidation of the principal. (*Tiffany* v. *Boatman's Institution*, 9 N. B. R., 245, 18 Wall., 376; *Wheelock* v. *Lee*, 10 N. B. R., 363, 64 N. Y., 242; *Beach* v. *Fulton Bank*, 3 Wend., 573.) I think also it is clear that the whole series of notes in this case are all to be treated as renewals of the original loans. (See *National Bank* v. *Lewis*, 75 N. Y., 516.) The parties here treated them as such. But even if the respondent is right in his claim that no account can be taken of payments in excess of legal interest made by Hoole & Son, it makes no material difference as respects this motion, for whether we go back to the first loan in 1870, or only to the time of the death of John

R. Hoole, Jr., the substantial fact remains that upon a proper and equitable statement of the account between the assignee and Larned, there was nothing due Larned in excess of the value of the security, and the debt was wholly, or for the most part, paid for which he held the policies in pledge, and the averments of the petition and affidavit on which the order now sought to be vacated was made, were untrue.

It is wholly immaterial that there was no fraud as between Larned and the assignee. It is not sought to vacate the order on that ground. The power and the duty of the court to vacate do not rest on proof of fraud, or even on the theory that the parties or either of them was guilty of any intended fraud or deceit upon the court. It rests upon this, that the order was procured by a material misrepresentation of facts to the court, and that if the real facts had been stated the court would not have made the order. Larned, even if wholly innocent of fraud, cannot now claim to hold on to the benefits of an order which he aided in procuring by a false representation of the facts.

It is clear that if the facts now disclosed and then known to the parties had been made known to the court, the order would not have been made. Upon the most favorable view of the case for Larned, it was a case of a doubtful or disputable claim, and one m which the power of the court to authorize a compromise might properly be invoked. The negotiation between the parties shows that it was so treated by them, and mutual concessions were made, very slight on the part of the creditor, and very large on the part of the assignee, to effect the settlement. Yet the court itself is restricted by the General Order so that it cannot authorize the compounding of a claim without notice to creditors (General Order 17), or at any rate cannot authorize a compromise except upon testimony and upon a petition "*clearly and distinctly*" setting forth "*the subject matter of the controversy and the reasons why the assignee thinks it proper and most for the interests of the creditors that it should be settled.*" (General Order 20.) Yet this assignee undertook to compromise this matter himself, which

clearly he had no power to do, and then, to give an apparent sanction to the settlement already agreed to, he united with the creditors, to whose great advantage the settlement was made, in presenting the matter to the court, not as a matter in controversy, or a disputed claim that was to be compounded and settled, but as the case of an unquestioned claim against the estate, for which the creditor held securities of less value than the debt, which he offered to take in full satisfaction thereof. The case thus presented was a clear case for the granting of the order. The real case, which was concealed, was a case in which, according to the settled practice of the court, and under the General Orders, it would have directed an inquiry by reference and notice to creditors.

The relation of the parties was such as to suggest the suspicion that this concealment of the real case from the court was due to intended concealment designed for the benefit of this creditor, but I have preferred to consider the case as free from intended fraud or deceit.

There is no question of the right of any creditor to make this application. He is interested in the distribution of the estate, and can apply to the court to have an order which, through mistake or fraud, has been improperly made to the prejudice of the creditors, vacated and set aside. If he has been buying up claims against the bankrupt, or has a personal motive in prosecuting this proceeding other than his mere interest as a creditor, or is acting in concert with the assignee, all of which is charged against him by Larned, I do not perceive that it is material or in any way affects his rights as a creditor to maintain this petition. Nor has there been any delay, laches, or acquiescence on the part of the creditor which Larned can avail himself of to defeat the petition. So far as appears, Larned has not altered his situation in reliance on the action of the court in any respect, and if he had I do not perceive that he can make that an objection, as he was a party to the misrepresentation by which the order was obtained.

The creditors are not limited to proceedings against the assignee in such a case. Nor will the court remit them to a

doubtful remedy by litigation against him when it can, in the bankruptcy proceedings itself, without prejudice to the rights of any party, set right the wrong he has done. The court will protect him against his own mistakes which are injurious to the estate where it can do so without injury to other persons.

If the creditor, Larned, has any interest in or right to hold those policies, he will be at liberty to proceed in the mode prescribed by the statute to enforce his rights, but he cannot sustain these rights by an order improperly obtained. Whatever rights he has will not be prejudiced by the vacating of this order.

Order vacated upon surrender by the assignee of the release executed by the creditor.

## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

APRIL 29, 1879.

Where several persons unite in a common design to effect the fraudulent and unlawful disposition of the property of a bankrupt, they may be joined as defendants in one suit brought by the assignee, although the relief sought against them respectively relates to different parts of the estate.

The bankrupt was adjudicated upon a creditor's petition, filed May 15, 1877. More than two months before the filing of the petition he transferred parts of his property to several creditors, in satisfaction of their claims, being then insolvent to the knowledge of said creditors, and he and they knowing that the transfers were intended for the purpose of preferring them over other creditors, to whom he was indebted as endorser for his son, who was also insolvent. *Held*, That the transfers could not be impeached as preferences under R. S. 5128.

One of the creditors so preferred being the wife of the bankrupt, and it appearing that soon after their marriage, twenty years before his bankruptcy, the bankrupt had received moneys belonging to his wife, which he had frequently promised to repay or secure to her, and also had received the income of her separate estate, which he had never restored to her; *Held*, That the transfer to her must be considered the payment of a debt, and not a voluntary conveyance. (*Humes* v. *Scruggs*, 4 Otto, 22, distinguished.)

More than two months before the filing of the petition, the bankrupt conveyed to another party a house and lot, the title to which had been taken in his name, but which was purchased with the money of such other person, and which was in her possession, the title being held at her request and for her convenience in the bankrupt's name; *Held*, That though the trust was void under the laws of New York, the conveyance was not void under the Bankrupt Law, nor in fraud of creditors, nor to be deemed a voluntary conveyance of the bankrupt's estate.

The bankrupt having sold a farm to one S. prior to his bankruptcy for a low price, but not grossly inadequate, the purchaser knowing that he was in financial difficulty, and having reason to believe that he intended to use the proceeds to prefer some of his creditors; *Held*, Upon the facts, that the conveyance could not be set aside as being void under the Bankrupt Law.

The deed to S. not being recorded till after the filing of the creditors' petition; *Held*, Immaterial.

Within two months before the filing of the petition, the bankrupt assigned, in part payment of a debt due his wife, his interest or right to a dividend in the estate of his son who was indebted to him and had made an assignment for the benefit of his creditors. After the appointment of the assignee in bankruptcy, the assignee under the voluntary assignment of the son brought a suit in the Supreme Court of the State against his assignor and the assignor's creditors, for the settlement of his accounts and the distribution of the assigned fund. The assignee in bankruptcy was made a party to that suit, and put in an answer claiming the dividend as belonging to him as assignee in bankruptcy. The suit coming on for trial, there being evidence that an assignment of the dividend had been made to the bankrupt's wife, she was, by order of the court, made a party defendant, and thereupon the assignee and the bankrupt's wife litigated in that suit the question of the validity of the assignment to the wife, the bankrupt's assignee insisting that it was void on the same grounds on which he sought to avoid it in this suit. The decision of the Special Term was in favor of the bankrupt's wife, but this decision was reversed by the General Term and a decree entered in favor of the assignee in bankruptcy; *Held*, On these facts, that the State Court had jurisdiction to determine the rights of the parties, and that the decree was binding on the assignee, and that he could not maintain this action for the same relief.

## *EDGAR M. VAN KLEECK, Assignee, &c.*, v. *JAMES D. MILLER et al.*

THE facts appear fully in the opinion.

*O. D. M. Baker*, for defendants.

*John P. H. Tallman* and *A. H. Wilkinson*, for complainants.

CHOATE, J.—This is a suit in equity, brought by the assignee in bankruptcy of the defendant, James D. Miller, to set aside various transfers and assignments of parts of his estate prior to the filing of the petition in bankruptcy, and to recover from the several defendants the same or their value, or the amounts of money alleged to have been paid to them in fraud of creditors or in violation of the provisions of the Bankrupt Law. The bill alleges a combination or common design on the part of the defendants to effect the fraudulent and unlaw-

ful disposition of the estate, the several portions of which came to the several defendants. Objection was made to what is called by the counsel for the defendants the improper joinder of six separate causes of action, and a motion was made after the proofs were in that he elect which cause of action he would proceed upon, and that the bill be dismissed as to the rest, there being, as it is claimed, an entire failure to prove that the several alleged illegal transfers and payments were made in pursuance of a common design on the part of the defendants, but the disposition made of the case renders it unnecessary to consider this point. A bill is not multifarious, though brought to recover from several defendants different portions of the estate of a debtor, if the alleged illegal transfers were the result of a common purpose on the part of the defendants to dismember the estate. (*Boyd* v. *Hoyt*, 5 Paige, 65; *Platt* v. *Preston*, 19 N. B. R., 241.)

The defendants who have answered the bill, and against whom the principal relief is sought, are Alfred Stall, the alleged fraudulent grantee of a farm in the town of Milan; Emily E. Morse, the daughter of the bankrupt, an alleged fraudulent grantee of a house and lot of land in Stanford, Dutchess County; William Vail and Henry Tallmadge, former creditors of the bankrupt, to whom it is alleged that he transferred parts of his estate by way of preference; Pamelia Miller, the wife of the bankrupt, to whom it is alleged that he transferred and suffered to be transferred, by means of a levy on execution, parts of his property, either without consideration and in fraud of creditors, or, if there was a consideration in an antecedent debt, by way of an illegal preference; and Daniel W. Guernsey, to whom it is alleged an illegal assignment of a chose in action was made as security for a hundred dollars, without consideration, and fraudulently as to creditors.

The petition in bankruptcy was filed by the creditors of James D. Miller on the 15th of May, 1877. Prior to his bankruptcy, Miller was a farmer, living at Stanford, Dutchess County. He owned a house and lot in that place, on which he lived, a farm in the adjoining town of Milan, a wood lot,

a house and lot in the city of Poughkeepsie, some bonds and mortgages and personal chattels, and he had a claim against his son John H. Miller for money lent. There was also standing in his name as owner another house and lot in Stanford, which was occupied by his daughter, Mrs. Morse. It had been purchased wholly with funds belonging to her, and the title had been taken in his name at her request. He was indebted to the defendant, William Vail, his brother-in-law, in the sum of three thousand dollars; to the defendant, Henry Tallmadge, his cousin, in the sum of two thousand dollars. He was liable as maker or endorser on notes used by his son, John H. Miller, in the son's business and for his accommodation for about ten thousand dollars. He had been married about twenty years, and soon after his marriage received from his wife about one thousand four hundred dollars of her money, no part of which he had ever repaid, and on which he had paid no interest. He had also received on account of his wife during about twenty years the interest on a fund of about three thousand two hundred dollars, held by trustees for her benefit, no part of which he had ever paid her.

Within a few days before the 8th of February, 1877, he had represented himself to some of his creditors to be entirely solvent, and to be worth fifteen thousand dollars over and above all his debts. Shortly before the same day, it became known that his son, John H. Miller, was in financial difficulties and unable to meet his business obligations. This became known also to the defendant Pamelia Miller, the wife of the bankrupt, and on the 8th of February John H. Miller made a general assignment for the benefit of his creditors to the defendant Guernsey, who is an attorney at law, having an office at Poughkeepsie, but living in the country near the bankrupt Miller. On that day Guernsey was at Miller's house and there met Miller and his wife, and the defendant Vail. On the same day the bankrupt executed a deed conveying to Mrs. Morse the house and lot which had been purchased with her funds, and the defendant Pamelia Miller joined in the deed to release her dower. On the next day suits were commenced

against the bankrupt by Mrs. Miller, Vail, and Tallmadge, to recover their several alleged debts. To these actions the bankrupt interposed no defence. At or about the same time, an action was commenced against the bankrupt by another creditor on one of the accommodation notes issued by John H. Miller. The defendant Guernsey was the attorney for the plaintiffs in all these actions. On the 8th of February Miller transferred to his wife two bonds and mortgages, on which the amount due was one thousand five hundred dollars; the same day, or the next day, other property worth six hundred and forty dollars and fourteen cents, and in the complaint in her action these sums were credited, and a balance of five thousand seven hundred and seventy-eight dollars was claimed, made up of one thousand four hundred dollars, with interest from April, 1, 1855; divers sums, amounting to four thousand two hundred and sixty-two dollars and fifty cents, loaned between April 1, 1855, and February 9, 1877, of which had been repaid only two thousand one hundred and forty dollars and fourteen cents, this credit being in fact intended for the two bonds and mortgages and other property above referred to. February 24, 1877, the bankrupt transferred his farm in Milan to the defendant Stall for a consideration of five thousand five hundred dollars, which was paid in a bond and mortgage, made payable, at Miller's request, to the defendant William Vail, for four thousand five hundred dollars, and a note for one thousand dollars. These securities were delivered by Stall to Miller on the 24th of February, when the deed was delivered. The conveyance was made in pursuance of an oral agreement between Miller and Stall made a week or more before that day, but the form of the mortgage as payable to Vail was not mentioned until the day of the transfer. Stall entered into possession under his deed, went into the place to live April 2d, and since that time has remained in possession. His deed was not recorded until June 6, 1877. On the 2d of March judgments were entered against Miller in the actions brought by his wife, Vail, and Tallmadge, but before the judgments were entered, Miller had transferred to Tallmadge, in

payment of his debt, the note for one thousand dollars received from Stall, and a note of Mrs. Miller, his wife, for one thousand one hundred and five dollars, the two being together the amount of Tallmadge's claim, and he had also transferred to the defendant Vail the bond and mortgage for four thousand five hundred dollars received from Stall in settlement of Vail's claim, taking back from him Vail's note for one thousand three hundred and twenty-six dollars, the excess of the bond and mortgage over Vail's claim. This note was given to Mrs. Miller in consideration of her giving the note to Tallmadge. On these payments being made known to the defendant Guernsey, he had the judgments in favor of Tallmadge and Vail satisfied of record. An execution was issued on the judgment in favor of Mrs. Miller, under which a levy was made on the house and lot where Miller lived, and they were sold on the execution and bid in by Mrs. Miller for three thousand dollars, and Miller and his wife have ever since continued to live there as before. On the 24th of March Miller made an assignment of his interest in the dividend coming from the estate of John H. Miller under the voluntary assignment for the benefit of his creditors, first to the defendant Guernsey for the amount of one hundred dollars, and secondly, to his wife for the balance of her claim against him, and thirdly, to another creditor. The amount of this dividend, though not then ascertained, afterwards proved to be one thousand and eighty-two dollars and seventy cents.

The effect of these various transfers and operations undoubtedly was, that all the property of Miller available to pay his debts, or that he was possessed of, had gone to his three creditors, Vail, Tallmadge, and Mrs. Miller, or been transferred to his daughter, Mrs. Morse, and there was nothing left for his other creditors, and I think the testimony tends strongly to show that from the 8th day of February, when these transactions commenced, the defendants Vail, Tallmadge, and Mrs. Miller knew that Miller was unable, in consequence of his son's failure, to pay all his debts, and that these transactions were designed to secure and prefer Vail, Tallmadge, and Mrs.

Miller over the other creditors, and that so far as they severally took part in these operations they were acting upon this common purpose and design; but so far as the transfers complained of prior to the 15th of March, 1877, were merely transfers in payment and satisfaction of the debts of Miller, there is nothing in the Bankrupt Law making such preferences unlawful, the same having been made more than two months before the filing of the petition in bankruptcy. There is nothing in the laws of New York forbidding such preferences, nor any thing in the laws of the State or of the United States making it unlawful for several creditors with the aid of their debtor to conspire or combine together to get an advantage over other creditors by and through such a voluntary preference, provided that the means used are not unlawful, and subject, of course, to the preferences being avoided if it shall turn out that within two months thereafter a petition in bankruptcy shall be filed. The evidence undoubtedly tends to show on Miller's part an intent to prefer Vail and Tallmadge, and there is evidence tending to show that they had such knowledge of the condition of his affairs that if the transfers had been within two months of the bankruptcy they would be avoided under Revised Statutes 5128, but this is the utmost that the testimony shows as to the transfers to these defendants. No case is made against them under Revised Statutes 5129, which avoids transfers and payments intended to prevent the property from coming to the assignee, or being distributed under the Bankrupt Law, or to evade its provisions. This Section includes the common case of voluntary conveyances, payments, and transfers to conceal and cover up property, or upon secret trusts for the benefit of the debtor when he is insolvent or in contemplation of insolvency or bankruptcy; but it does not include cases where the real and actual intention is to pay debts, however obnoxious the transaction may be to the provisions of Section 5128 as preferences. Now, in the present case, all the acts of these two parties in connection with the transaction complained of, as well as those of the debtors, in relation to the transfers to these two creditors,

tend only to show a purpose to get these debts paid. There is no evidence which would warrant a finding that what these two creditors took they took upon any secret trust, or for the benefit of anybody but themselves, or otherwise than in payment of their claims, and as these transfers to them were more than two months before the filing of the petition the bill must be dismissed as to them.

As to the conveyance of the house and lot to Mrs. Morse, it was clearly shown by the testimony that the property had been purchased with her money, and for convenience and at her request the title had been taken in the name of the bankrupt. Nor was this with any design to deceive or defraud creditors. Although the laws of New York may not recognize and enforce such trust as against the party so holding the legal title, yet there is nothing in the laws of the State which forbids or makes unlawful, or holds to be in fraud of creditors the voluntary performance of the obligation to make a conveyance in pursuance of such a trust. When the conveyance is made it rests upon and is supported by a valuable consideration, namely, the money received. But the most unfavorable view that can be taken of the transaction is that it was a preference, for the bankrupt was undoubtedly indebted to Mrs. Morse for the purchase money. If the property is to be regarded as belonging to him, and the transfer having been made more than two months before the filing of the petition, it is not void as a preference under Revised Statutes, Section 5128. The bill as to this defendant must be dismissed.

The claim made against the defendant Stall is, that the Milan farm was conveyed to him for a totally inadequate consideration; that it was worth eight thousand dollars and was sold to him for five thousand five hundred dollars; that he was a party to the combination or conspiracy to divest the bankrupt of his property for the benefit of a few of his creditors; that the conveyance was kept secret, the deed not being recorded till June 6th; and that the transfer was, in fact, fraudulent as against creditors as being intended to aid the bankrupt in secreting, concealing, and fraudulently disposing of his property.

Stall, the purchaser, undoubtedly knew that Miller was selling this farm because he was in financial difficulties. He was informed by Miller that he would not probably be able, except for a short time, to convey a good title. What took place at the time the deed was delivered was notice to him, probably, that the proceeds of the farm were being used by Miller in paying some of the creditors of Miller, but beyond this I think the evidence does not warrant the conclusion that he knew or had reasonable cause to believe that Miller was intending so to dispose of his property as to exclude any of his creditors from the benefit thereof, or that he was contemplating bankruptcy or insolvency. And even if he was fully aware of the intention of Miller to prefer certain of his creditors by the use of the proceeds of the sale of this farm, that would constitute no ground for avoiding the sale; certainly not, as the preferences were not themselves unlawful, as has hereinbefore been held, unless the sale was fraudulent on other grounds. Was the sale, then, fraudulent as not made in good faith, or as being a cover for a secret trust, or as designed to aid Miller to defraud his creditors, or by reason of inadequacy of consideration? Gross inadequacy of consideration is, in itself, very strong evidence of an intention contrary to that which appears on the face of the conveyance. It is a circumstance strongly pointing to an intention to create a secret trust, or to cover up, conceal, and keep from creditors the property of the grantors. But in this case the weight of the testimony is, I think, that Stall gave a reasonably fair price for the farm. Miller was anxious to sell and Stall knew it. Stall was, in fact, looking for a farm to hire or work on shares, and Miller offered him this farm for five thousand five hundred dollars and Stall accepted his offer. Miller had put it in the hands of a real estate broker to sell, and the broker had held it at eight thousand dollars but found no purchasers. Miller himself had offered it to another party at five thousand five hundred dollars, but he had refused to buy. Persons familiar with the value of land in the neighborhood testified that they considered the price which Stall gave all that it was worth. There was evi-

dence that Miller had represented it shortly before as worth eight thousand dollars, but such declarations by an owner, even if not affected or induced by some motive to exaggerate the value at the time, are of scarcely any weight as evidence. Very few sales of real estate within the last six years would stand if the fairness of the price were to be tested by the prior expectations or declarations of the owner as to the value of the property. There is not the slightest reason to believe from the evidence that the sale was not a real sale as between the parties, or that the land was held by Stall in any way or to any extent for the benefit of Miller, or upon any secret trust whatever. Even if he bought it for a low price, taking advantage of the necessities of Miller, it has been held too often that this is not in itself a fraud to render it necessary to cite authorities. Certainly the inadequacy of price is not proved by the testimony, and if it existed was not so gross as to base upon it any charge of fraud. The failure to record the deed does not affect his title. The deed was not kept off the record in pursuance of any request of Miller. The failure to record it appears to have been accidental or the mere result of carelessness. The record was not necessary to the passing of the title, nor does the failure to record make the deed void or fraudulent as to creditors. The case is, therefore, unlike those in which, by the law of the State, a conveyance unrecorded or unfiled is conclusively and absolutely void as to creditors, as in the case of an unfiled chattel mortgage by the law of New York. (*Platt* v. *Preston*, *supra*.) Even an agreement on Stall's part with the bankrupt not to record the deed, or to keep it secret, would, it seems, not make the conveyance void, the object of the Bankrupt Law not being "to prevent false credits" but to secure "ratable distribution" of the assets of the bankrupt. (*Sawyer* v. *Turpin*, N. B. R., 271, 1 Otto, 121.) The bill must, therefore, be dismissed as to this defendant.

The case against Mrs. Miller, the wife of the bankrupt, as to all property transferred to her more than two months before the filing of the petition in bankruptcy—that is to say, all except the transfer of the dividend coming from the estate of

John H. Miller, depends on the question whether the bankrupt was indebted to her to the extent of the property so transferred. If he was so indebted, the transfers were only preferences, and being more than two months before the bankruptcy, they cannot be impeached under Revised Statutes, Section 5128. Assuming the fact of indebtedness, no different intent on Miller's part or on hers is shown from that which actuated the transactions with Vail and Tallmadge, already fully discussed. The amount of the property so transferred, including that seized on her execution on the 2d of March, is claimed by the plaintiff to have been in value somewhere from five thousand six hundred and fifty dollars to six thousand eight hundred and fifty dollars. The amount of the judgment recovered by her, after crediting two thousand one hundred and forty dollars of this property, was five thousand seven hundred and ninety-eight dollars and thirty-four cents. While a judgment suffered by default by a bankrupt is not conclusive on the assignee, either as to the fact or amount of indebtedness, where the question is of an intended fraud against creditors (*Humes* v. *Scruggs*, 4 Otto, 22), yet it is obvious that if this judgment was properly rendered upon the facts as they actually existed, there was an indebtedness exceeding the amount of the property transferred to Mrs. Miller. The payment of the sums of one thousand four hundred dollars and three hundred and forty dollars of her money to her husband soon after their marriage, and the subsequent receipt by him of the income of the fund held in trust for her benefit during a period of nearly twenty years, were proved not only by the testimony of the bankrupt and his wife, but by other disinterested and unimpeached witnesses. There was no evidence tending to control the testimony of the bankrupt and his wife that for these original payments he promised to give her notes whenever she should request it, nor was there any evidence tending to control their testimony that none of these moneys had ever been repaid. There was no evidence from which it could be justly inferred that she had ever given these moneys, or any of them, to him, and I do not doubt that, under the laws of New York, she was, upon the

proofs here exhibited, entitled to recover them with interest, as moneys lent. Her claim was not, in my judgment, seriously affected, or its *bona fides* impaired by the statement made by her, that her husband owed her one thousand four hundred dollars. Taking her whole testimony together, and making proper allowances for her age and unfamiliarity with business matters, and especially considering the proof adduced wholly independently of her testimony, it is evident that in this statement she referred to the sums first loaned, and that her testimony is not to be taken as a denial or disproof of any indebtedness for interest or subsequent loans to him. The facts that no note was ever given, and no request for repayment made till he got into difficulty on account of his son's failure, are not, in my judgment, considering the relations of the parties, circumstances of sufficient weight to overcome the evidence of promises to repay, proved as to a part of these moneys and implied by the law from the face of their receipt as to the others. Until that event there was no occasion for taking security or insisting on payment. The case of *Humes* v. *Scruggs* (*ut supra*) is relied on by complainant's counsel as sustaining his position, that if a wife allows her husband to have and use her money in his own business indefinitely, she cannot then claim it as against other creditors after he becomes bankrupt. The case does not sustain the point. The gist of that decision was, that a conveyance by a husband to a wife, even several years before the commencement of bankruptcy proceedings, of property many times exceeding in value the indebtedness of the husband to the wife, will be held to be a fraud upon creditors, if made when he is hopelessly insolvent. In the particular case before the court, the property was in value five times the amount of the debt, and the husband was, at the time of the conveyance, as his wife well knew, hopelessly insolvent. Under such circumstances it was entirely clear that the conveyance was a mere cover under pretence of paying a debt due the wife for a voluntary settlement on her which the husband's financial circumstances rendered fraudulent, or else for a secret trust for his benefit in fraud of his creditors. The point of the decision is in

these words of the court: "If the husband in a state of absolute bankruptcy conveys to his wife property fairly worth fifteen thousand dollars to twenty thousand dollars, with no present consideration passing, but with a recital of past indebtedness to her to less than a fifth of its value, the transaction is fraudulent and void as to creditors." In repelling the suggestion as unfounded that the wife's money had been invested in the purchase of the property so transferred, the Court used this language: "If the money which a married woman might have had secured to her own use is allowed to go into the business of her husband, and be mixed with his property, and is applied to the purchase of real estate for his advantage, or for the purpose of giving him credit in his business, and is used for a series of years, there being no specific agreement when the same is purchased that such real estate shall be the property of the wife, the same becomes the property of the husband for the purpose of paying his debts. He cannot retain it until bankruptcy occurs, and then convey it to his wife. Such conveyance is in fraud of the just claims of the creditors of the husband." This language is not to be deemed as asserting the doctrine that the wife whose moneys are so received by the husband ceases to be his creditor for the moneys so received, or forfeits by what she has allowed the husband to do with the money any of her rights as creditor in case of bankruptcy. The particular question under discussion was, whether on the facts stated, *a trust in the land itself*, in favor of the wife, could be implied as against creditors, and this trust was held not to be established. The case does not establish any difference in the position of a bankrupt's wife as a creditor from that of any other creditor, nor does it establish the doctrine that the acts of the wife or any other creditor in aiding the debtor to create or keep up a false credit, without any active fraud or misrepresentation to creditors, that is by the *mere* suffering or permitting him to use money or property as his, is a fraud that the Bankrupt Law takes notice of as impairing the rights of a creditor, or his capacity to take and hold property in payment of his debt, even though it be a

known preference, provided he obtains it more than two months before the bankruptcy. There is nothing in this case cited inconsistent with the case of *Sawyer* v. *Turpin*, cited above, which distinctly holds that no such doctrine is recognized by the court as the result of the Bankrupt Law. On the ground, therefore, that these preferential transfers to Mrs. Miller were sustained by a valid consideration in an existing indebtedness, and were made more than two months before the filing of the petition, this part of the complainant's case against her wholly fails.

There remains to consider the transfer to Mrs. Miller on the 24th of March of the dividend coming from John H. Miller's estate. This was, within less than two months before the bankruptcy, and might be impeached as an unlawful preference in this suit but for the proceedings in respect thereto had in an action in the State Court, in which both Mrs. Miller and this complainant, the assignee in bankruptcy, were parties. The material facts in relation to that other proceeding are, that on the 25th of August, 1878, six months before this suit was commenced, the defendant Guernsey, as assignee of John H. Miller under the voluntary assignment, commenced an action in the Supreme Court of the State of New York against John H. Miller and his creditors entitled to the benefit of that assignment, for the settlement of his accounts and the distribution of the assigned fund. The complainant, as assignee in bankruptcy of James D. Miller, was made a party defendant, and appeared, put in an answer, and claimed the dividend belonging to James D. Miller, as his assignee in bankruptcy. Upon the trial it appeared that an earlier assignment had been made by the bankrupt to his wife, Mrs. Miller, and thereupon, by direction of the court, she was made a party defendant, and after she came in and put in an answer, claiming the dividend as belonging to her under the assignment from the bankrupt dated March 24, 1878, a further hearing was had, and the assignee in bankruptcy, complainant herein, and Mrs. Miller litigated the question of the validity of Mrs. Miller's assignment, this complainant insisting that it was void on the same

grounds alleged and insisted on in this suit. After hearing the cause, that court decided and entered a decree sustaining the validity of her assignment. This complainant appealed from that decree to the General Term of the same court, and the General Term reversed the decree, holding that the assignment to Mrs. Miller was void as a preference, and a decree was entered accordingly in favor of this complainant. It is now insisted by the complainant that the State Court had no jurisdiction to hear and determine this matter in controversy between himself as assignee in bankruptcy and this defendant, Mrs. Miller, on the ground that this court only has jurisdiction to hear and determine that question, and that all that the State Court could properly do in the premises was to remand the fund to this court for the decision of this question. There is, however, no foundation for this claim. That suit was one of which the State Court had jurisdiction. It had also jurisdiction of the parties. It was obliged, in the due course of its proceedings in that suit, to determine which of the two parties before it was entitled to receive a certain portion of the fund to be distributed. Each claimed it. Their titles to it were conflicting. The mere fact that in the determination of this question it became necessary to pass upon the legal rights of the parties as affected by the provisions of the Bankrupt Law did not take away or impair the jurisdiction of the court, or prevent it from deciding to which of the two parties the dividend belonged. The laws of the United States, so far as they affect the rights of parties litigant in suits tried before a State Court, are necessarily taken notice of and applied by those courts as are any other laws affecting those rights and binding on the parties. It is only very recently that the fact that a right arising under a law of the United States has been by Act of Congress made the ground for giving Federal Courts jurisdiction of actions to enforce such rights, and this circumstance has been only made by the Act the ground for conferring this jurisdiction on the Federal Courts concurrently with the State Courts. (Statutes 1875, Chap. 137, Sec. 1.) In many matters the Bankrupt Law gives the Federal Courts exclusive juris-

diction, but the case pending in the State Court now in question was not one of them. Nor is there any Statute of the United States which provides that the Federal Courts shall exclusively determine the question, however it may arise, whether an alleged transfer or payment is a fraudulent preference under the Bankrupt Law. The Statute of 1874, Chap. 390, Sec. 2, amending the Bankrupt Law, has no bearing on the question, because whatever effect that Statute may have in restricting the jurisdiction of the State Courts, it applies only to actions for collection of the assets of the bankrupt. (*Brewers and Maltsters' Insurance Company* v. *Davenport*, 10 Hun, 264; *Olcott* v. *Maclean*, id., 277.) The complainant, therefore, having in a prior suit litigated this very question with this defendant, and having there obtained a judgment in his favor, cannot maintain this bill for the same relief. (See *In re* Dakin, 19 N. B. R., 184.) And as to the defendant Pamelia Miller, this bill must be dismissed, but without prejudice to any rights accrued or to accrue in said suit in the State Court.

No case is made out against the defendant Guernsey. In his answer he disclaimed all interest in the dividend on John H. Miller's estate under the assignment to him, and upon the proofs it appears that in the suit above referred to he had, by his complaint and other proceedings, disclaimed and effectually estopped himself from claiming any such interest. Therefore this suit as against him was unnecessary and the bill must be dismissed.

The defendant, Martha R. Stall, wife of Alfred Stall, seems to have been joined only in order that she may be decreed to unite with her husband in a reconveyance of the Milan farm. The case against her fails, as the conveyance to Alfred Stall is not to be set aside.

As to all the answering defendants the bill is dismissed with costs.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

JULY 15, 1878

Where one member of a firm borrows money on his individual obligation for the benefit and use of the firm, a chattel mortgage given by the firm subsequently, to secure the debt, is an adoption of the debt as a debt of the firm, and such a transaction is not a fraud upon the creditors of the firm under the Bankrupt Law.

An assignee in bankruptcy can maintain a suit to avoid a mortgage given by the firm which is void by the laws of the State where it is executed as a fraud upon creditors, although it may not be voidable by the provisions of the Bankrupt Law as a fraudulent conveyance.

Where a firm executed a chattel mortgage on an unfinished stock of pianos and piano materials, giving the mortgagors, who remained in possession, the power to carry on the business in their own name, though as the secret agents of the mortgagee, with authority to purchase new materials and parts of pianos, and to apply the proceeds of the business to paying the expenses of carrying it on and of materials purchased, and the remainder, if any, toward payment of the debt; *Held*, That the mortgage was fraudulent as to the creditors of the firm, and should be adjudged void at the suit of the assignee in bankruptcy.

## *FREDERICK S. WAIT, Assignee, &c.*, v. *THE BULL'S HEAD BANK.*

THE facts appear fully in the opinion.

*J. V. V. Olcott* and *E. E. Anderson*, for complainant.
*John H. Glover* and *R. L. Sweezy*, for defendants.

CHOATE, J.—The debt for which the mortgage was given was not the individual debt of one of the partners. At the time of the giving of the mortgage, if not before, his obligations to the bank for the use of the firm were adopted by the firm. The mortgage in terms so adopts them. This was no fraud upon creditors any more than a payment by the firm of moneys advanced by a partner for its use would be. If the mortgage was void under the laws of New York, as given to defraud and delay creditors, the property described in it undoubtedly passed to the assignee under the Bankrupt Law, although the mortgage might not be voidable as made in violation of the provisions of the Bankrupt Law itself. (*Platt* v. *Preston*, 19 N. B. R., 241.)

The question whether or not the mortgage was void as delaying and defrauding creditors is one of fact to be determined upon all the circumstances of the particular case. In this case, I cannot escape the conclusion that it was fraudulent. There was no obvious or apparent change of possession, and the acts of the parties, as shown by the accounts and papers, and the testimony of the officers of the bank, show that, contemporaneously with the execution of the mortgage, it was agreed that the mortgagors should remain in possession, go on with the business so far as to employ workmen, purchase materials and parts of pianos necessary for completing the unfinished pianos, and work up the materials on hand with those thus purchased into new pianos, sell those to be finished, with the approval of the mortgagees, on credit or for cash, and apply the proceeds, first, to the expenses of this business, and then, if any remains, to the mortgage debt. The materials and new parts required to be thus purchased were a substantial part, both in amount and value, of the resulting product. Although the mortgagors agreed to do this as the mortgagees' agents, there was no outward manifestation of a change of possession, nor anything to lead other creditors to suspect that the mortgagors were not working on their own account. The fatal objection to the arrangement was, that it did not secure the application of the mortgaged property to the payment of the debt immediately, or within a reasonable time. If the business to be carried on with this view proved unsuccessful, no part of the debt might be paid, and yet all the property be disposed of, and, meanwhile, all other creditors would be delayed for the sake of giving this creditor a possibility, merely, of payment out of the property. Such an arrangement is necessarily void as to creditors, and as any other creditor could before and at the time of the filing of the original bankruptcy petition break it up, the assignee in bankruptcy can recover the property for the benefit of the creditors at large.

It is unnecessary to determine now what part, if any, of the money received by the defendants from the sale of pianos, beyond the sum of five hundred and ninety-four dollars credited

by them, should be regarded as paid to them in discharge thereof. They claim to have applied the rest of the money according to the agreement with the mortgagors. If they have not, it of course must be credited on the mortgage debt, and the evidence of such application is insufficient; but the question will more directly arise if the defendant shall offer to prove its debt.

Decree adjudging the mortgage void; terms of the decree to be settled on notice.

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## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

MAY 27, 1879.

Prior to May, 1877, one B. owned a bakery and stock of confectionery goods, and at that time the bankrupt purchased one-half of it for four thousand dollars, giving two thousand nine hundred dollars in cash, and a bond for the balance secured by a mortgage on his wife's property, and thereafter B. and the bankrupt carried on the business together till September 11, 1877, when the bankrupt bought out B.'s half for four thousand dollars, giving his four notes for one thousand dollars each, payable in four, nine, twelve, and eighteen months, secured by a chattel mortgage on the tools, furniture, and fixtures of the establishment, which had cost about two thousand five hundred dollars a year before; and thereafter B. continued in the bankrupt's employ until January 2, 1878, being entirely familiar with his business, and on the 23d of November, 1877, B. surrendered the chattel mortgage and two of the notes having the longest time to run, and the bankrupt gave him in lieu thereof a note for two thousand dollars on demand, and on the same day payment of said note was demanded and refused, and a suit thereon was commenced, in which the bankrupt suffered default, and judgment was entered December 31, 1877, and execution immediately issued thereon, under which a levy was made on the 2d of January, 1878, on all the stock of goods of the bankrupt, including a large amount which he had purchased on credit during the three months immediately preceding, greatly in excess of the apparent requirements of his business. And after the levy, and on the same day on which it was made, the bankrupt executed a general assignment to B. for the benefit of his creditors, and B. immediately took possession of all the property of the bankrupt, being appointed keeper by the Sheriff, who authorized him to carry on the business. The bankruptcy proceedings were commenced by a creditors' petition filed January 18, 1878.

*Held*, That the general assignment was void as against the assignee in bankruptcy, and that the title of the assignee related back to the date of the general assignment, and cut off the lien of a creditor whose execution was levied on the goods subsequently thereto, and before the filing of the creditors' petition.

*Held*, That the levy under B.'s execution was also void as a preference.

The principle that an exchange of securities made by the bankrupt before the bankruptcy is not to be regarded as a preference, does not apply where, as in this case, the new securities given to the creditor are of obviously greater value than those surrendered, or give him the means of obtaining, by judgment and by levy of execution, a better or earlier lien on the bankrupt's property, and where such unequal exchange is effected with the design to give and receive a preference over other creditors.

In this case, on the facts, the exchange of the two time notes and chattel mortgage for the demand notes, was such an unequal exchange with intent to give and receive a preference, and that, therefore, the levy which resulted from it must be set aside.

## *CORNELIUS L. WARING, Assignee, &c.*, v. *JAMES S. BUCHANAN et al.*

THE facts appear fully in the opinion.

*L. Henry*, for complainant.
*W. D. Dickey*, for defendants.

CHOATE, J.—This is a suit in equity brought by the assignee in bankruptcy of one Burke to set aside, as void under the Bankrupt Law, a general assignment made by Burke to the defendant, Buchanan, January 2, 1878, and also the levy of an execution on a judgment against Burke in favor of Buchanan, which levy was made on the same day that the assignment was executed, but prior to the delivery thereof, upon all the stock-in-trade, furniture, and fixtures in Burke's place of business, a confectionery store and bakery in the city of Newburgh. The bankruptcy proceedings were commenced by creditors' petition January 18, 1878. The suit is brought against Buchanan, the voluntary assignee and judgment creditor, who claims to hold the property also by the levy of his execution, Reuben R. Carr, the sheriff of Orange County, one Hallock, the assignee of Buchanan's judgment, who claims to have paid five hundred dollars therefor, and one Skidmore, who recovered a judgment against Burke, and whose execution was put in the sheriff's hands January 16, 1878, under which it is claimed that a levy was made on that day. Skidmore was served but did not appear. The other defendants appeared and defend the suit.

Prior to May, 1877, Buchanan owned and carried on this bakery and confectionery store. At that time Burke purchased one-half interest in it for four thousand dollars, giving two thousand nine hundred dollars in cash, and a bond for the balance secured by a mortgage on other property belonging to his wife. They then carried on the business together. On the 11th day of September, 1877, Burke bought out Buchanan's remaining interest for four thousand dollars, for which he gave four notes of one thousand dollars each, payable in four, nine, twelve, and eighteen months from September 11th, secured by chattel mortgage on the tools, furniture, and fixtures of the establishment. They had cost about two thousand five hundred dollars a year before. After this purchase, Buchanan continued in Burke's employ at a salary, and down to the date of the assignment and levy in question, January 2, 1878, he was entirely familiar with Burke's affairs. On the 23d of November, 1877, Buchanan surrendered the chattel mortgage and two of the notes having the longest time to run, and Burke gave him a new note for two thousand dollars on demand. Payment was demanded the same day, and the same being refused, a suit was commenced thereon the same day. Burke made no defence, and December 31, 1877, judgment was entered on his default for two thousand and thirty-five dollars. Execution was immediately issued, and January 2, 1878, the sheriff levied under the same upon all the visible property of Burke, including not only the property covered by the chattel mortgage, but a large stock of goods, most of which were purchased by Burke in December, 1877. Later in the same day, the general assignment was executed. It covered all of Burke's property, and was for the benefit of all his creditors without any preference. Buchanan took immediate possession of all the property. The sheriff appointed him his keeper, and authorized him to carry on the business and work up the materials on hand, and he continued to do so till January 19, 1878, when he was stopped by injunction from this court. During this time he admits having sold goods to the amount of about five hundred and forty-six dollars. Since the service of the

injunction, by consent of all parties, the property has been sold by the sheriff, and the proceeds, less certain amounts deducted for his fees and disbursements, have been deposited subject to the order of this court. The whole proceeds, as returned by the sheriff, are two thousand one hundred and thirteen dollars and forty-one cents. His bill of fees, etc., amounts to seven hundred and five dollars and eighty-four cents. The proceeds of the property included in the chattel mortgage were about two hundred and sixty dollars.

The general assignment was clearly void as against the assignee in bankruptcy, under the well settled rule of construction of the Bankrupt Law as applied in this court. And the avoidance of the assignment carries the title of the assignee in bankruptcy back to the date of the voluntary assignment, so as to avoid the intermediate levy of the defendant Skidmore. (*In re* Biesenthal, 15 N. B. R., 228.)

The question whether the defendant's Buchanan's levy on the 2d of January is to be set aside, depends upon the question whether the transaction of November 23d, surrendering the two notes and chattel mortgage for the demand note, is to be regarded as an unlawful preference. Upon a careful consideration of all the testimony, I think this transaction is clearly shown to have been a fraudulent preference within the Statute. (Revised Statutes, Section 5128.) It is well settled that a mere change of securities or other exchange of property between the creditor and the bankrupt, though within the period and under circumstances of knowledge as to the debtor's condition which would make an original transaction a preference, cannot be impeached as such, provided that the exchange is really and in good faith what it purports to be. (*Sawyer* v. *Turpin*, 13 N. B. R., 271; 1 Otto, 114.) But if the property received is of much greater value than that surrendered, it seems clear that the transaction must be obnoxious to the objection that it is a preference, if an original transaction at the same time and under the same circumstances would be so. In the present case the avowed purpose of taking the demand note, instead of the time note secured by chattel mortgage, was to effect a change of se-

curities that is to give the creditor, instead of his chattel mortgage, the advantage of a levy on the debtor's property subject to execution. The security he was to obtain was not within the expectation of either party to be restricted to the property covered by the chattel mortgage, which, though nominally worth as much as the new note, was not, if sought to be applied to the payment of the debt, nearly sufficient for that purpose. The bringing of an action at once, and the placing of the creditor at the earliest time consistent with fair appearances in a position where he could levy, was unquestionably part of the intention of both parties at the time of the substitution. Without such further proceedings on the new note it would have been no security at all, and the acts of the parties leave no room for doubt that the immediate demand and the immediate commencement of the action, so that after twenty days the creditor could at any moment perfect his lien by execution, were parts of the arrangement between them, of which the surrender of the chattel mortgage and the time notes, and the giving of the demand note constituted the first steps. The transaction was out of the usual course of the debtor's business, and so presumptively fraudulent under the statute, but independently of the statute, which throws the burden of proof on those who affirm the good faith of the transaction, there are many and abundant badges of fraud connected with it. Buchanan was intimately acquainted with Burke's business affairs up to and after the 23d of November. Burke was undoubtedly insolvent at that time, and Buchanan must have known it. I think the evidence shows also that, after this change of securities, Burke, at the suggestion of Buchanan, made large purchases—much larger than the nature and condition of his business required or warranted. The proper conclusion, I think from the evidence, is, that they sought thereby to accumulate a sufficient stock of goods to satisfy Buchanan's execution with. Burke purchased over nine thousand dollars worth of goods, mostly on credit, in the month of December. No sufficient explanation of this is given. Certainly, what is disclosed about the amount of business he had reason to believe he could

do does not justify the conclusion that it was for any legitimate business purpose. By this accession of property Buchanan was enabled to secure his judgment, and he appears to have waited just long enough after the 12th of December, when he might have entered his judgment, to enable Burke thus to replenish his stock. The correspondence between Burke and his creditors shows that the existence of the chattel mortgage had been the means of injuring his credit, but the subsequent acts of the parties were too plainly directed to giving Buchanan an advantage over other creditors, and too well adapted to that purpose, and too regardless of all other interests to allow any credit to be given to the pretence made that the only reason for changing the security was because Burke's credit was thus injuriously affected, and that they had no other purpose in view than giving him a better credit, and enabling him to go on with his business. It is urged that the chattel mortgage was good security for the two thousand dollars, but the nature of the property was such that, although it cost more than that, it would realize very little if sold and separated from the establishment, as the result showed, and undoubtedly at that time Buchanan desired to realize his claim against Burke.

The seizure of the bankrupt's property under Buchanan's execution must therefore be declared void as an unlawful preference, and Buchanan must account for the property which came into his possession. The sheriff's bill has never been allowed or passed on by this court, and it contains several questionable items. A decree for an account must be entered against him. The defendant Hallock took nothing by his assignment from Buchanan, but as it does not appear that he ever received any of the property or its proceeds, he is not obliged to render an account.

Decree accordingly.

UNITED STATES DISTRICT COURT—NEW JERSEY.

NOVEMBER 29, 1880.

Where an individual member of a partnership goes into bankruptcy, it is his duty to include in his schedules his interest in the partnership property as well as his individual assets.

A cause of action *ex delicto*, for fraudulently representing a third party to be worthy of trust and credit, is not within the description of assets (Revised Statutes, Section 5056) which pass to the assignee in bankruptcy.

## *In re RILEY A. BRICK.*

PETITION to vacate discharge. The facts appear fully in the opinion.

*J. T. Easton*, for petitioners.
*William L. Dayton*, for bankrupt.

NOXON, J.—This is a proceeding to vacate and set aside a discharge in bankruptcy. The ground alleged in the petition is, that the bankrupt wilfully swore falsely in the affidavit annexed to his petition, schedule and inventory, in that he swore that the said schedule and inventory were a true statement of all his estate, both real and personal, whereas in truth the bankrupt, at the time of making the affidavit and petition and inventory, had, together with another, an interest in a suit then pending in the Supreme Court of the State of New York, to recover the sum of seventeen thousand dollars and interest, which suit was commenced on the 4th day of January, 1877; was pending and undetermined when said petition was filed and the schedules and inventory were made, and was entitled Riley A. Brick and Wm. H. Campbell, plaintiffs, and Frank F. Fowler, defendant; and that such proceedings were had thereon, that a judgment was recovered on the 21st day of April, 1879, in favor of the plaintiffs for seventeen thousand three hundred and sixty-nine dollars and eighty-five cents, for damages and costs, and that the bankrupt has now and had at the time of making the said schedule, inventory and affidavit, and at the time of the granting of the discharge,

an interest in said suit, and in the result thereof, of which his creditors were entitled to the benefit.

The bankrupt has answered the petition denying that he had any beneficial interest therein which was assignable under the provisions of the Bankrupt Act; and further submitting, if he had, that it was a partnership asset, and did not go to his assignee for the benefit of his individual creditors.

The facts are substantially as follows:

The bankrupt was engaged in business in the year 1875 with one William H. Campbell, under the firm name of R. A. Brick & Co., and in the month of July of that year, made sale to the Peekskill Iron Company, six hundred tons of pig iron for thirteen thousand two hundred and twenty-two dollars, and received and accepted in payment therefor six promissory notes of the company, maturing in course in the months of October and November following. The sale was negotiated by Brick on the part of the partnership, and Fowler on the part of the iron company, he being its vice-president and trustee. A few weeks after the completion of the transaction, by the delivery of the iron and the acceptance of the notes, the company stopped payment on its liabilities, became hopelessly insolvent, and paid nothing on account of the purchase. Brick & Co. claimed that Fowler was personally liable for their loss, on account of his wilful misrepresentations of the pecuniary condition of the company, made by him to Brick while the negotiations for the sale were going on. He was accordingly sued in an action of tort, in the Supreme Court of New York, for his false and fraudulent representations of the solvency of the company, and while this action was pending, the partner, Brick, filed his individual petition in bankruptcy in the court for his discharge from his personal debts. In his schedule no reference was made to any partnership assets, or partnership liabilities, nor to this claim for damages against Fowler. It is insisted, in the petition to vacate the discharge, that such an omission by the bankrupt is proof (1) that he wilfully swore falsely to the truth and correctness of his schedules; and (2) that he concealed his assets from his creditors.

(1.) The first reason assigned by the counsel of the bankrupt why the discharge should not be set aside on the ground that the schedules did not contain all the assets of the bankrupt, is based on the proposition that where an individual member of a partnership files his petition in bankruptcy, and makes up his schedules without mentioning partnership assets or debts, and asks for his discharge only from his individual liabilities, he is not required by the law to include any partnership assets in his schedules of property. It is claimed that his discharge, when granted upon such a petition and adjudication, applies to and releases him only from his individual debts, and does not release him from his partnership obligations.

Much support for such a proposition is doubtless found in a number of the adjudged cases. (*In re* Little, 1 N. B. R., 341; *In re* Shepard, 3 N. B. R., 172; *Hudgins* v. *Lane*, 11 N. B. R., 462; *Corey* v. *Perry*, 17 N. B. R., 147.) And I have so much respect for the opinion of the learned judges who have thus held, that I have, with great care and consideration, examined the grounds on which they have founded their judgment, and regret that I am unable to reach the same conclusion. There are difficulties, I confess, in the matter, growing out of the provisions of the Bankrupt Act and the General Orders in regard to proceedings in the case of partnerships, but not stopping to set forth in detail the reasons for my opinion, I think that Judge Lowell, in *Wilkins* v. *Davis* (15 N. B. R., 60) has correctly stated the law, and indicated the proper practice, and that it is the duty of the bankrupt, in such cases, to include in his schedules his interest in partnership property, as well as his individual assets.

(2.) The second reason assigned is, that only such property as is assignable should be included in a bankrupt's schedules, and the suit in question being an action *in tort*, is not assignable, and would not pass to the assignee in bankruptcy.

Section 5016 of the Revised Statutes, in referring to the schedules and inventory which the voluntary bankrupt must annex to his petition, provides that "the said inventory must

contain an accurate statement of all the petitioner's estate, both real and personal, *assignable under this title*, describing the same, and stating where it is situated, and whether there are any and if so what incumbrances thereon." What description of property is stated to be assignable?

Section 5044 provides for the assignment of the bankrupt's estate to the assignee by the judge or register as soon as the assignee has been appointed and qualified, and the property which is vested in him by the deed is set forth in Section 5046, to wit: "All property conveyed by the bankrupt in fraud of his creditors, all rights in equity, choses in action, patent rights and copyrights, all debts due him, or any person for his use, and all liens and securities therefor, and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract, or for the unlawful taking or detention or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power, and authority to sell, manage, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made." It will be perceived that this includes causes of action which the bankrupt had against persons arising from contract, or from the unlawful taking, or detention, or injury to his property, but not causes of action arising *ex delicto*, and clearly the bankrupt is not required to put upon his schedules any rights which would not pass to the assignee. I am not without authority for this construction of the statute. In *In re* Crockett et al. (2 N. B. R., 210), the learned Judge of the District Court of the United States for the Southern District of New York has occasion to examine into the question whether there were any assets of a former copartnership in existence at the time of filing a petition in bankruptcy. In speaking of one of the alleged assets, he says: "The claim against Black, Brothers & Co. is shown to be a claim in suit arising from the fact that Black, Brothers & Co. recommended a certain person to the copartnership as worthy of trust, and the copartnership, on such recommendation, en-

trusted merchandise to such person for sale, and he disposed of it and did not account for the proceeds. This suit is brought for fraudulently and deceitfully recommending a person as worthy of trust and confidence. Such a claim is not within the description in the Fourteenth Section (Section 5056) of the Act, of the assets which pass to the assignee in bankruptcy. It is not a debt or security for a debt, or a right in equity, or a chose in action or a right of action for property; nor is it a right of action for a cause of action arising from contract. It is an action of tort for the fraud and deceit, and not an action on a contract."

As the bankrupt was not required to inventory such a claim, and as all the reasons for setting aside the discharge are founded upon such omission, the petition must be dismissed with costs.

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UNITED STATES DISTRICT COURT—S. D. NEW YORK.

OCTOBER 18, 1881.

In a proceeding to set aside a composition in bankruptcy, a sale of the bankrupt's stock and fixtures, made prior to the adjudication, would not be disturbed on the ground of inadequacy of price. On this ground it might probably be avoided by an assignee in bankruptcy.

A creditor who, with full knowledge of the schedule estimates, voted for the composition and received payment under it, cannot be heard in seeking to set aside the composition for mere inadequacy, and because the amount so offered and paid was not as much as the schedules indicated might have been offered.

A bankrupt, from whom a composition is received, is necessarily at liberty to deal with his assets as he chooses. The creditors have no concern in the matter if their composition be paid and no fraud practised.

## *In the Matter of JAMES G. SHAW and HENRY R. MAYETTE, Bankrupts.*

THIS was a petition filed in this court on the twenty-sixth day of June, 1877, by Frederick M. Peyser, to vacate and set aside the composition made by the above named bankrupts with their creditors, and duly confirmed by an order of this court on the first day of December, 1875, and to vacate and set aside the discharge of said bankrupts from their debts.

The bankrupts were a firm engaged in the manufacture of blank books in the city of New York. On or about the seventh day of August, 1875, being unable to meet the payment of all their debts, they sold all their stock and fixtures to one Randolph N. Smith, receiving therefor his notes and a chattel mortgage on all the said stock and fixtures as collateral security for the payment of said notes.

On the twenty-first day of August, 1875, the said bankrupts filed in this court their petition in voluntary bankruptcy. All subsequent proceedings were regularly taken.

The said notes and mortgages were entered on the schedules as a part of the assets of the bankrupts.

The petitioner herein was present at the meetings of the creditors, voted for a composition at fifteen per cent. in cash, and received full payment under such composition.

The L. L. Brown Paper Company and the Whiting Paper Company were creditors of the bankrupts, and favored said composition. L. L. Brown and William Whiting were the active representatives of said companies, and they, individually, advanced the money needed to pay the debts of the bankrupts under the composition, and received in return therefor the assets of the bankrupts.

All other facts sufficiently appear in the opinion.

*Scudder & Carter*, for petitioner.
*Alfred J. Taylor*, for bankrupts.

BROWN, D. J.—The sale of the stock and fixtures to Smith for the sum of fifty-eight thousand two hundred and twenty-eight dollars and fifty cents would not be disturbed on the ground of inadequacy of price. This sum is more than there is any probability an assignee in bankruptcy could have made out of the property, and the evidence does not show its value was any more than that, if as much, considered as a gross sale in bulk. The sale is shown to have been a device merely to avoid immediate sale on execution in suits pending against the firm. On this ground it might probably have been avoided

by judgment creditors or by an assignee in bankruptcy. But it was in fact made, as the evidence shows, in the interest of the general creditors, and was doubtless so regarded by them. Smith was an employé of the firm; his notes, secured by mortgage on the stock, represented the whole price, and the possession was practically unchanged. It is scarcely possible that any creditor could have been deceived or misled by this thin disguise, and had there been any desire to disturb the arrangement so made, the creditors would have proceeded to choose an assignee in bankruptcy to set it aside. Instead of doing so they voted almost unanimously to accept a composition of fifteen per cent. This was done with full knowledge of all the essential facts. The notes represented the full value of the stock. The schedules and the chattel mortgage apprised the creditors of the main facts, and had they desired any further information they should have examined the bankrupts before accepting the composition, as the law provides they may and intends they shall then do, as to any matters concerning which further information is needed. (Section 5103; *Ex parte* Walker, 34 L. T., N. S., 701.)

There is nothing however in the evidence, even as it now appears, so far as respects the amount of the bankrupt's estate, which would vary essentially the apparent amount of assets. The schedules showed about seventy thousand dollars estimated assets, of which fifty-eight thousand were notes of Smith, secured by the mortgage, being about thirty per cent. on the entire indebtedness, and that is the amount of dividend which Peyser, the petitioner, testifies Shaw told him the estate would pay. The creditors, including the petitioner, with all this in full view, nevertheless voted to accept fifteen per cent. cash, and the composition was approved by the court and paid.

If any creditor was dissatisfied on the ground that the estate would net a sum more nearly approaching to what the schedules showed, namely, twice the amount offered as a composition, it was his right and his duty to present his objections at the time. Least of all can a creditor who, like the petitioner, voted for the composition and received payment with

full knowledge of the schedule estimates, and after being told by the bankrupts that the estate would pay thirty per cent., be heard in seeking to set the composition aside for mere inadequacy, and because the amount so offered and paid was not as much as the schedules indicated might have been offered; and the evidence does not prove any better condition of the assets, substantially, than the schedules indicated, if, in fact, as good.

In the figures exhibited as to the subsequent business, no account is taken of expenses. (*In re* Herman, 17 N. B. R., 440; *in re* Marionneaux, 13 N. B. R., 222.) The only additional ground for setting the composition aside is, as the petition alleges, that two creditors—the Whiting Paper Company and the L. L. Brown Paper Company—fraudulently represented to the petitioner that they were willing to take fifteen per cent., whereas they were fraudulently conspiring to procure the assets for their own use by paying other creditors fifteen per cent. in order to make their own debt in full.

The evidence fails to establish any such design or result, or any case of fraud or conspiracy. Mr. Whiting and Mr. Brown, the active representatives of those two companies, made no representations of any kind to the petitioner, nor, as appears, to any other creditor, except undertaking to see the composition paid. After the adjudication in bankruptcy, these two companies signed the paper for a voluntary compromise at fifteen per cent., which was not acted on, since the signatures of some, of whom the petitioner was one, could not be and were not obtained. The evidence does not show that any more than possible proceedings in bankruptcy were contemplated at the time of the sale to Smith. Had the plan alleged by the petitioner been in existence prior to the bankruptcy proceedings, viz., a plan to force a settlement at fifteen per cent. for the benefit of Shaw, Whiting, and Brown, it is inconceivable that Shaw, after the bankruptcy, should have told Peyser, as the latter testifies, that the assets would pay thirty per cent. This fact proves that there was no such plan, and confirms the direct testimony that the arrangement for paying

the composition originated after the bankruptcy, and grew naturally out of the situation.

The evidence shows that these two companies found it greatly to their interest to maintain Mr. Shaw's large trade, if possible, as that was the principal outlet for the sale of their manufactures. They had aided Mr. Shaw before, and now, to keep up their business, Mr. Brown and Mr. Whiting, individually, were willing to advance fifteen per cent. cash, and take the assets for their indemnity.

There is no evidence of concealment, collusion, or unfair advantage on their part over other creditors. At a meeting of creditors at Fifth Avenue Hotel this arrangement was openly discussed. Mr. Whiting and Mr. Brown were desired to name some sum which they would advance and take the assets, and one other creditor is specified who was desired by them to join in raising the money, but declined.

A bankrupt from whom a composition is received is necessarily at liberty to deal with his assets as he chooses: that is his means of payment; and where cash is offered, it is to be presumed that it is done by some immediate pledge or transfer of his assets; how or with whom this is effected is wholly immaterial to his creditors, so long as no fraud or unfairness is practiced upon them. (*In re* Reiman, 11 N. B. R., 21, 45; *In re* Van Auken, 14 N. B. R., 425; *Ex parte* Hamlin, 16 N. B. R., 320, 322.)

From the known fact that Shaw & Co. had no money themselves; that cash was the offered composition; from the open talk by other creditors with Whiting and Brown in regard to their advancing the money; and the failure to examine the bankrupts in regard to their means of paying the offered composition, it may fairly be assumed that the creditors either generally knew that Whiting and Brown were to advance the money, or else that they were too indifferent to make any inquiry on the subject. There being no fraud and no concealment, they are chargeable with knowledge of what they would easily have ascertained upon inquiry, and it could not have been supposed that Whiting and Brown would advance some

thirty thousand dollars to other creditors except upon some arrangement to take the assets for their indemnity. Under the circumstances of the case, the assent of the creditors thereto is, I think, to be plainly inferred; and in what manner they afterward dealt with the assets, whether forming a company or corporation, or with or without Mr. Shaw, is immaterial. Had Brown and Whiting individually been creditors, the case is therefore not essentially different from what an express arrangement between them and the other creditors would have been for them to advance the composition on the strength of the assets. Such an arrangement is valid, though those making the advances thereby get paid in full, and not infrequent in the English practice. (*Bissell* v. *Jones*, 19 L. T., N. S., 262; *Ex parte* Nicholson, 22 L. T., N. S., 286.)

But Whiting and Brown were not individually creditors of the bankrupts. They stand, therefore, as respects the creditors, in the same situation in which any other persons not creditors would have stood in regard to their right to treat with the bankrupts concerning an advance of money to enable them to pay the composition offered. The assets being fully released by the creditors to the bankrupts by force of the acceptance of the composition, the bankrupts are at perfect liberty to deal with third persons in regard thereto in any way they see fit, and the creditors have no concern in the matter, if their composition be paid and no fraud practiced. All were paid promptly in this case, and I see no legal ground, therefore, for interfering with the composition which was accepted and performed.

Whether Whiting and Brown eventually made any profit by means of these large advances, which, with the mortgage on the machinery paid off by them, amounted to some fifty thousand dollars, does not appear and is immaterial. It does not appear that their own companies have received even the fifteen per cent. dividend. But that also is immaterial, as it is their own fault if not paid.

The testimony is that during the first two years, notwithstanding their large outlays and the appraisal of the stock at

thirty thousand dollars in forming the new corporation, the profits of the business were nothing. That they expected to make some profits may be assumed; and that the advance which they consented to make was fixed at a percentage which they thought safe, and such as would leave a margin of profit to themselves, is also to be assumed. To fix that percentage was the very subject of arrangement with the creditors at the time of the composition. In accepting the percentage offered, the creditors bound themselves to the amount thus fixed; and as everything material is proved to have been known to some, was matter of common discussion, was without concealment, and easily ascertainable by all who chose to make inquiry, the composition ought not now to be disturbed.

The petition should be dismissed with costs.

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## UNITED STATES SUPREME COURT.

### OCTOBER TERM, 1880.

**To avoid a conveyance by the bankrupt on the ground that it was made to prefer a creditor, it must be shown that the person receiving it, or to be benefited thereby, had reasonable cause to believe that the person making the conveyance was insolvent, and that it was made in fraud of the Bankrupt Act.**

## *MELISSA A. BARBOUR et al., Appellants,* v. *STEPHEN B. PRIEST, Assignee, &c., of HUBBARD COLBY.*

APPEAL from the Circuit Court of the United States for the Northern District of Ohio.

The facts appear fully in the opinion.

MILLER, J.—The appellee brought his bill in chancery in the District Court for the Northern District of Ohio, as assignee in bankruptcy of Hubbard Colby, to set aside and avoid two mortgages made to appellant a short time before proceedings were commenced against Colby as a bankrupt. The Dis-

trict Court rendered a decree against the assignee, which was reversed on appeal to the Circuit Court, the latter holding the mortgages void under the Bankrupt Law. From that decree this appeal is taken.

Mrs. Barbour was the widow of Justus S. Barbour, and guardian of his minor children, and Colby, the bankrupt, was administrator of said Barbour's estate. He was the brother-in-law of Mrs. Barbour, whose husband had been dead many years, and Colby, after administering the estate, had retained in his hands about twenty-four thousand dollars, which he had never paid over to her as he should have done.

Colby was a man of reputed wealth, and the owner of much valuable real estate, and it is obvious from the testimony that Mrs. Barbour reposed unlimited confidence in him, and relied on him for the general management of the estate. On the eleventh day of June, 1873, Mrs. Barbour received a notice from the probate judge to make a settlement showing the condition of her accounts as guardian, and to file a new bond. She filed the new bond, but did not make the settlement. On September 20th of the same year she received another notice requesting her to file a statement of her accounts the next day. She swears in her testimony that she handed both these notices to Mr. Colby, and requested him to attend to the affair, and that she relied on him entirely in the matter. On the first day of October, Colby made two mortgages on distinct parcels of real estate, for the purpose of securing his indebtedness to Melissa A. Barbour in her right as widow, and as guardian of the minor children of her husband, in the sum of twenty-two thousand seven hundred and twenty-two dollars and twenty cents, then in his hands as administrator of the estate of Justus Barbour.

Colby was adjudicated a bankrupt on a petition filed November 3, 1873.

The testimony on which the decree was rendered is very voluminous, and need not be critically examined here. We think three propositions of fact are so clearly established that there can be little doubt about them. They are:

1. That when Colby made the mortgages to Mrs. Barbour he was insolvent, and knew he was in that condition.

2. That he intended by those mortgages to give Mrs. Barbour a preference over his other creditors, by securing the debt due her and her children from him as administrator of Barbour's estate.

3. That Mrs. Barbour did not know, nor have reasonable cause to believe, that Colby was insolvent when the mortgages were made and filed for record.

It will be perceived that the conveyances which are here in question were made, and the proceedings in bankruptcy were commenced against Colby, before the date at which the Revised Statutes became the law, and before the Act of 1874, amendatory of the Bankrupt Law, was passed. The validity of these mortgages, then, so far as they are affected by the Bankrupt Laws of the United States, is to be determined by Section 35 of the original Act of 1867. So much of that section as relates to the question before us reads as follows: "Section 35. And be it further enacted, That if any person being insolvent, or in contemplation of insolvency, within four months before the filing of a petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, or assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby or by such attachment, having reasonable cause to believe that such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited."

The act of making these mortgages by Colby, though he knew that he was insolvent, and knew that he was preferring

Mrs. Barbour as a creditor at the expense of others, is not forbidden by the common law, and is not a violation of the statute laws of most of the States of the Union. Nor is it an act forbidden by any general rule of morals or of abstract justice. It was in fact a meritorious act, aside from the positive rule established by the Bankrupt Law. He had long had this money of a confiding widowed sister-in-law and her orphan children, and while holding it in a fiduciary capacity he had used it for his own purposes. He saw her called to account for it by the Probate Court, and knew he was unable to refund it. He also saw the gulf of bankruptcy before him, and before he was buried beneath its waters he determined at least to secure this debt, the creation of a trust reposed in him. Who shall arraign him for it in the Court of Conscience?

If, then, it was forbidden neither by the common law, nor by the statute of the State, nor by the highest sense of honor, it must be made to appear clearly that it is void under the section of the Bankrupt Law which we have quoted, or else it must stand.

It is a fundamental condition of the right of the assignee to avoid such a conveyance, that the person receiving it, or to be benefited thereby, should have had reasonable cause to believe that the person making such conveyance was insolvent, and that it was made in fraud of the Bankrupt Act.

The obvious meaning of this provision is to require the concurrence of the creditor who gets security for his debt in the purpose of defeating the Bankrupt Act. Such person must have reasonable cause to believe the grantor in the conveyance was insolvent at the time it was executed, *and* that it was made with intent to defeat the Bankrupt Law. Both these must exist as facts which the grantee had reasonable cause to believe. And so careful was Congress to protect the rights acquired by an honest creditor, that unless bankrupt proceedings are commenced by or against the debtor within four months after such a preference, it should stand good, though the creditor knew the debtor was insolvent, and knew that the conveyance was intended to defeat the purpose of the Bankrupt Law

in securing equality of distribution of the debtor's property. And this period was reduced by the Act of 1874 to two months.

It has never been denied, so far as we are advised, that in attacking such a conveyance by the assignee of the bankrupt, it is necessary to prove the existence of this reasonable cause of belief of the debtor's insolvency in the mind of the preferred party.

The testimony fails to establish that Mrs. Barbour had any reasonable cause to believe this of Colby. She was a widow, devoted to her children. Her business affairs were managed for her by others. Colby was her brother-in-law and friend, and had been the friend of her deceased husband. He had been reputed for many years to be a wealthy man. He was known to be the owner of valuable real estate. All this was well understood by Mrs. Barbour, while she did not know, and had no reason to suspect, that he was largely in debt and his real estate covered by mortgages. Up to the time of the failure of the First National Bank of Mansfield, September 26, 1873, very few persons had any doubt of Mr. Colby's entire solvency. The rapid succession of events in the locality where Colby and Mrs. Barbour resided, and its effect upon Mr. Colby's condition, as described by some of the witnesses, might well have been matters of which Mrs. Barbour was ignorant. She swears that she was, and no one is able to say that she had any reason to be aware of the effect of these matters on Mr. Colby. Nothing was brought to her notice or attention which would suggest a suspicion of his insolvency, and her confidence in him clearly was not shaken.

In the case of *Grant* v. *National Bank* (17 N. B. R., 498, 97 U. S. R., 80), this court said: "The act very wisely, as we think, instead of making a payment or a security void for mere suspicion of the debtor's insolvency, requires for that purpose that his creditor should have some reasonable cause to believe him insolvent. He must have knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man." Tested by this rule, which we think is the sound one, there is no evidence of any such knowledge brought

home to Mrs. Barbour. In fact, we do not believe that at the time the deeds were executed she even suspected Mr. Colby's insolvency or contemplated his failure.

It results from this view of the case that the decree of the Circuit Court must be reversed, and a decree rendered establishing the validity of the mortgages to her, and adjusting the rights of the parties on that basis.

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## UNITED STATES DISTRICT COURT—S. D. NEW YORK.

DECEMBER 4, 1879.

Under a provisional warrant in a bankrupt proceeding the marshal seized certain goods which were in the possession of the firm of D. & A. under a claim of title derived by purchase from persons in the employ of the bankrupt. The goods were delivered to the assignee by the marshal, and have been sold for the benefit of the estate. D. & A. sued the marshal for conversion, and have recovered a judgment on the ground that the warrant did not authorize the seizure of goods in the actual possession of a third party under claim of right, though the title thereto might be in the bankrupt. That suit is still pending in the State Court on appeal. The price paid by the parties who held the goods came to C. & Co., to whom the bankrupt was indebted under circumstances strongly tending to show that C. & Co. and one L., who was guarantor to C. & Co. for the bankrupt's indebtedness to them, had conspired with the purchasers to effect a fraudulent sale of the goods for the purpose of using the proceeds to pay the debt of the bankrupts to C. & Co.; *Held*, That although the transaction might be fraudulent as against the creditors and the assignee of the bankrupt, a bill in equity for an accounting and payment of the proceeds or value of the goods would not lie against C. & Co., L. and D. & A., because the assignee showed no legal injury to him by the fraud, his possession of the goods for the benefit of the estate being undisputed.

## *JAMES W. SMITH, Assignee, &c.*, v. *HORACE B. CLAFLIN et al.*

THE facts appear fully in the opinion.

*D. M. Porter*, for complainant.

*W. H. Arnoux*, *S. Tenney*, and *J. A. Koones*, for defendants.

CHOATE, J.—I do not see any principle on which this bill can be sustained upon the evidence. It is a bill brought by

the assignee in bankruptcy of the firm of Lagrave & Otis, praying for an accounting and payment to the complainant of the proceeds of certain goods of the bankrupt, alleged to have been fraudulently and unlawfully taken and disposed of by the defendants in pursuance of a combination between them to that end. It appears that after Lagrave & Otis failed and had absconded, the defendant Landers, who was a relative of Lagrave, and who was liable as guarantor for Lagrave & Otis to the defendants H. B. Claflin & Co. to the amount of five thousand dollars—the entire debt of Lagrave & Otis to H. B. Claflin & Co. being eight thousand three hundred dollars—obtained the goods from the defendants, George Wagner and George L. Wagner, employés of Lagrave & Otis, in whose possession they were, upon a promise to pay them some one thousand two hundred dollars due to them from Lagrave & Otis, with the avowed purpose of protecting himself against his guaranty by disposing of the goods and paying the proceeds to the defendants, H. B. Claflin & Co., upon the debt of Lagrave & Otis to them. The goods were worth about seven thousand dollars. The Wagners clearly had no right to sell them to Landers in this way, as he well knew, but the sale was made by a transfer of the bills of lading about one or two hours before the creditors' petition in bankruptcy was filed. Landers was himself a salesman in the employ of the defendants H. B. Claflin & Co. The goods were taken to H. B. Claflin's warehouse, and for the sake of secrecy the marks on the cases were altered; they were then removed to H. B. Claflin's store upon a consent obtained by Landers from one of their employés, and examined and repacked by Landers, and, with the aid of other persons in the employ of that firm, sent to another warehouse. The petition in bankruptcy was filed May 30, 1872. On the 10th of June, 1872, the goods being in warehouse, Landers sought an introduction to Mr. Doyle, of the firm of Doyle & Adolphi, who were also made defendants in this suit, and who were dealers in goods of the same kind as those thus taken by the defendant Landers. This introduction was made at H. B. Claflin & Co.'s store by one Wilkinson, a salesman of H. B.

Claflin & Co. And thereupon the defendant Landers offered the goods to Doyle for five thousand dollars, exhibiting the invoice of the goods, and Doyle thereupon agreed to purchase them upon a credit of four months, and he gave his firm's note for five thousand dollars at four months. This sale was made without an examination of the goods and with no previous acquaintance between Doyle and Landers, and upon Wilkinson's guaranty that it was all right. A few days after, the warehouse receipts were delivered to Doyle & Adolphi by Wilkinson, who held them at the request of Landers, so that Landers might not be found in the apparent possession of the goods. While the goods were still in the warehouse they were seized by the United States Marshal, who held a provisional warrant in this bankruptcy proceeding. Landers sold the note immediately to the defendant Baishfield, the cashier of H. B. Claflin & Co., for four thousand eight hundred dollars. Baishfield drew the money out of his account with H. B. Claflin & Co., in which he had standing to his credit about twelve thousand dollars. Landers immediately paid the amount he received, four thousand eight hundred dollars, to H. B. Claflin & Co. on account of the debt of Lagrave & Otis. The note was paid at maturity. On the 28th of June, 1872, Doyle & Adolphi sued the United States Marshal in a State Court for the conversion of the goods, alleging that they were the lawful owners and in the lawful possession thereof. The marshal defended on the ground that Doyle & Adolphi had no title, and that he was justified under the provisional warrant in seizing the goods as the property of the bankrupts. The first trial took place in June, 1875, resulting in a verdict for the defendant by direction of the court. The verdict was set aside and a second trial took place in December, 1876, which resulted in a verdict for the plaintiffs, Doyle & Adolphi, for seven thousand four hundred and twenty-three dollars. The jury found as matter of fact that Doyle & Adolphi were in possession, claiming to hold the goods in their own right, and that the sale to them was not a sham sale—that is, that they were not acting in the matter merely for Landers or H. B. Claflin & Co.—and the

court instructed the jury that the provisional warrant did not justify the marshal in seizing goods in possession, not of the bankrupts, but of a third party claiming them as owner for himself. That suit is still pending on appeal in the Court of Appeals.

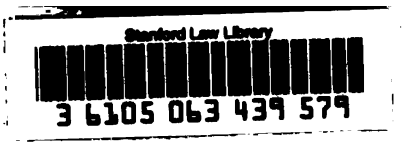
On the 10th of September, 1872, an order was entered by this court in the matter of Lagrave & Otis, bankrupts, upon the written consent of the attorneys who appeared for Doyle & Adolphi in their action against the marshal, directing that the assignee in bankruptcy sell at public auction the goods in question then being in his possession, and hold the proceeds according to the provisions of the Bankrupt Act. The goods having been seized by the marshal, were by him delivered to the assignee.

I think it is a fatal objection to the maintenance of this action that the assignee in bankruptcy has sustained no damage whatever by the wrongful acts complained of. Without question the transfer by the Wagners to Landers was a fraud upon the creditors of the bankrupt, and was also without any authority derived by them from the instructions of Lagrave & Otis or from their powers as agents of that firm. So far as these three defendants were concerned, the operation differed little, if at all, from robbery. Nor do I see how the defendants H. B. Claflin & Co. could hold on to the proceeds of the goods as against the assignee, if the payment to them operated to deprive him of the goods. Those proceeds are clearly traced into their hands. They gave no consideration for them, and they can hardly be held ignorant of the proceedings going on in their own place of business, transacted by their own employés for their own benefit, and of which they took and held the fruits. Nor, it seems, did Doyle & Adolphi take, as against the assignee, any better title than Landers, who, having purchased from agents having no authority to sell as this sale was made, took no title. And even if he took a technical title, which I think he did not, the very suspicious circumstances under which they bought, and not even relying on his apparent possession and ownership, but on Wilkinson's guaranty, would, it

seems, have made their title void as against the assignee, so that he could, after demand, have recovered the goods from them in a proper form of action. If they came not unlawfully into possession of the goods, they could not have held them against the assignee after demand. But the State Court has held—and there is no occasion here to question the correctness of the ruling—that the provisional warrant did not authorize the marshal to take the goods from them if they were in possession, claiming title in them for themselves. And on the ground that the title of Doyle & Adolphi, that is, their possession under a claim of title, was a good enough title against a trespasser, the suit was decided against the marshal. This decision appears to be in conformity with the construction given by the Supreme Court of the United States to those parts of the Bankrupt Law defining the summary jurisdiction of the District Court as a Court of Bankruptcy, which has been held not to extend to the determination of questions of title between the bankrupt and third parties. (*In re* Waitzfelder, 18 N. B. R., 260.) But the fact that the marshal in this proceeding was a trespasser did not affect the right of the assignee to the possession of the goods. He did not instigate the seizure by the marshal, and is not prejudiced by it. As the court held the law, the marshal, in seizing the goods, was not acting under his warrant at all. When, therefore, the assignee received the goods from the marshal he did not adopt the act of the marshal by which the marshal obtained them. If a thief had stolen them from Doyle & Adolphi, and the assignee found them in the thief's possession, I see no reason why he could not take them as the goods of the bankrupt if the thief gave them up to him, without being prejudiced in any way by the thief's acts. I know of no principle on which the marshal can call on the assignee, whatever may be the final result of the suit against the firm, for a return of the goods or their proceeds, or for reimbursement of his loss, if it proves such. Nor has this court any duty of protecting the marshal against the legal consequences of his unlawful act. If this is so, then the assignee, notwithstanding all the wrongs intended by the de-

fendants, is still in undisturbed possession, for the benefit of creditors, of the goods in question, and therefore has sustained no loss or damage. If loss results to the marshal this suit is not brought to relieve him, if indeed he can be relieved at all. And if the marshal finally prevails in his defence, it is of no concern to this complainant how the defendants may adjust the matter among themselves.

Bill dismissed without costs.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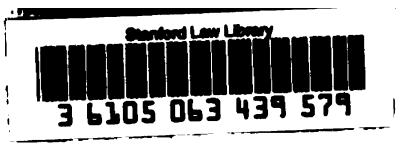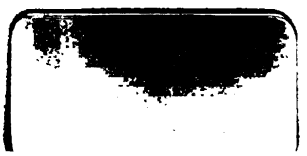
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